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TRANSCRIPT OF RECORD

Supreme Court of the United States

October Term, 1964

No. 256

BILLIE SOL ESTES, PETITIONER,

TEXAS.

**ON WRIT OF HABEAS CORPUS TO THE COURT OF
CRIMINAL APPEALS OF TEXAS**

**PETITION FOR HABEAS CORPUS FILED JULY 7, 1964
HABEAS CORPUS GRANTED DECEMBER 7, 1964**

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 256

BILLIE SOL ESTES, PETITIONER,

vs.

TEXAS.

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS

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[fol. 1]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

THE STATE OF TEXAS,

vs.

BILLIE SOL ESTES.

[fol. 2]

INDICTMENT—Filed July 20, 1962

In the Name and by the Authority of the State of Texas:

The Grand Jurors, duly selected, organized, sworn and impaneled as such for the County of Reeves, State of Texas, at the May A. D. 1962 Term, of the 143rd Judicial District Court for said County, upon their oaths present in and to said Court that Billie Sol Estes on or about the 2nd day of March, 1961, in the County and State aforesaid, by means of false pretenses and devices and fraudulent representations then and there knowingly and fraudulently made by him to T. J. Wilson, did induce the said T. J. Wilson to sign and place his, the said T. J. Wilson's, signature on an instrument of writing, and did induce the said T. J. Wilson to deliver to him, the said Billie Sol Estes, and the said Billie Sol Estes did then and there, and by the means aforesaid, obtain possession of and acquire from the said T. J. Wilson, said instrument of writing with said signature affixed thereto conveying and securing a valuable right, the said instrument being of the tenor following:

Michigan, Missouri and Texas

CHATTEL MORTGAGE

C I T
Corporation

ORIGINAL FOR
FILING OR RECORDING

2.

(Do not use this form in any transaction covering motor vehicles in a state prescribing a special contract form therefor)

This Form is Subject to State Legal Requirements Buyer's (Mortgagor's) Name T. J. WILSON Dated: MARCH 2, (MONTH, DAY)

196, Street Address 1101 SOUTH PLUM City Pecos County of REEVES State TEXAS

(Where filing is governed by residence and equipment is in same state show (a) for corporation, its principal [fol. 3] office stated in its charter, (b) for partnership, its business address and, in the space at the right here of the name and residence address of each Partner, and (c) for individual, his residence address. Otherwise, show business address of buyer.)

To SUPERIOR MANUFACTURING COMPANY

(NAME OF SELLER-MORTGAGEE)

4110 NORTHEAST EIGHTH AVENUE

(STREET ADDRESS OF SELLER-MORTGAGEE)

AMARILLO TEXAS

(CITY) (STATE)

The above-named Mortgagor, meaning all Mortgagors jointly and severally, having been quoted both a time and a cash price, hereby purchases from you, on a time price basis, the following described personal property, together with all attachments, replacements, substitutions and additions, hereinafter referred to as "equipment":

(Describe equipment fully including make, kind or unit, serial and model numbers and any other pertinent information)

75-500 GALLON SUPERIOR NH3 TANKS MOUNTED ON AND TOGETHER WITH

75-4 WHEEL SUPERIOR TANKS COMPLETE WITH TIRES, AXLES, WHEELS AND HOSE ASSEMBLIES.

SERIAL No's. SF-17214-500 THRU SF-17288-500

65—SUPERIOR NH3 APPLICATORS COMPLETE WITH REGULA-
TORS, SHANKS, KNIVES, HOSES, AND 65—200 GALLON
NH3 TANKS.
TANK SERIAL No's. 8304 THRU 8368.

for which Mortgagor agrees to pay you or your assigns
\$121,850.00 of which \$27,350.00 has been paid and \$—0—
(FULL TIME PRICE) (DOWN PAYMENT)
is to be paid upon (installation) and \$94,500.00 as balance
(delivery) (BALANCE)
of purchase price is payable in 60 successive, monthly in-
(INSERT NUMBER OF MONTHS)
[fol. 4] stalments of \$1,575.00 each, and one final instal-
(AMOUNT OF EACH PAYMENT)
ment of \$—0—, commencing April-15, 1961, and then on a
(MONTH, DAY)
like date of each month thereafter until fully paid.

Interest shall be payable monthly on unpaid balances at
the rate of xxxx% per annum and after maturity at the
highest lawful contract rate. All payments are due at C.I.T.
Corporation's office, New York, Chicago or San Francisco.
If any note is taken herewith, it shall evidence indebtedness,
only and not payment. In consideration of said purchase
and to secure the above-described balance. Mortgagor here-
by grants, bargains, sells, conveys, confirms and mortgages
unto Mortgagee all of said equipment;

To HAVE AND TO HOLD said equipment unto Mortgagee and
Mortgagee's sole use forever. Mortgagor covenants that
Mortgagor lawfully possesses said equipment and owns it
unencumbered and will warrant and defend said equipment
against all claims and demands of all persons.

Said equipment shall be kept at; No. 1401 SOUTH PLUM,
(STREET ADDRESS)

City of PECOS, County of REEVES, State of TEXAS, but shall
remain personal property and not become part of the free-
hold.

PROVIDED, NEVERTHELESS, that if Mortgagor pays Mort-
gagee said balance in money, as stated above, this mortgage
shall be void, otherwise to remain in full force and effect.

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AND PROVIDED FURTHER, that Mortgagor may retain possession of said equipment until any default hereunder.

Mortgagor agrees: to procure forthwith and maintain fire insurance with extended or combined additional coverage on the equipment for the full insurable value thereof for the life of this mortgage plus other insurance thereon in amounts and against such risks as you or assigns may specify, and promptly deliver each policy to you or assigns with a standard long form endorsement attached thereto showing loss payable to you and assigns as respective interest [fol. 5] ests may appear; your acceptance of policies in lesser amounts or risks shall not be a waiver of Mortgagor's foregoing obligations to pay reasonable attorney's fees for enforcing rights after buyer's default, all risk of loss, damage or destruction shall at all times be on Mortgagor; to pay promptly all taxes, assessments, license fees and other public or private charges when levied or assessed against equipment or this mortgage or any accompanying note; to satisfy all liens against the same. Time is the essence; if any of said debt be not paid promptly when due or if equipment be removed or disposed of or encumbered, or whenever you or assigns shall deem equipment or the debt insecure, all unpaid instalments shall become immediately due and payable and Mortgagor agrees to return equipment to you or assigns on demand, and you or assigns may, to the extent permitted by law, without notice or legal process enter any premises where equipment may be and take possession of it. Mortgagee may foreclose this mortgage in the manner provided by law and to the extent not prohibited by law equipment may be sold with or without notice at private sale or at public sale, with or without having equipment at the sale, at which you or assigns may purchase, and the proceeds thereof, less expenses of retaking, repairing, holding, reselling and reasonable attorney's fees (15% of the unpaid balance, if not prohibited by law), credited upon the amount unpaid and Mortgagor will pay the balance forthwith as a deficiency for the breach of this mortgage, any surplus however, to be paid to Mortgagor.

Waiver of any default shall not be a waiver of any other default all your rights are cumulative and not alternative, if you assign this mortgage you shall not be assignee's agent for any purpose; Mortgagor will settle all claims, defenses, set offs and counterclaims it may have against you, directly [fol. 6] with you, and not set up any thereof against your assignee, you hereby agreeing to remain responsible therefor; no waiver or change in this mortgage or related note, shall bind such assignee unless in writing signed by one of its officers. Upon full payment of this mortgage, assignee may deliver all original papers to you for Mortgagor. No oral agreement, guarantee, promise, representation or warranty shall be binding. Mortgagor waives all exemptions and homestead laws and acknowledges receipt of a true copy hereof. If any part hereof is contrary to, prohibited by or deemed invalid under the applicable laws or regulations of any jurisdiction, such provision shall be inapplicable and deemed omitted but shall not invalidate the remaining provisions hereof.

T. J. WILSON

(Signature of Individual or name
of Corporation or Partnership)

By /s/ T. J. WILSON

Signature
of
Buyer-
Mortgagor

Title OWNER

(If Corporation have signed by
President, Vice-President, or
Treasurer and give official title.
If Owner or Partner, state which)

Witness

Witness

(Signature of Two witnesses,
necessary only in the State of
Texas)

ACCEPTED:

SUPERIOR MANUFACTURING CO.

By _____)

Title Vice President)

(If Corporation, give official
title. If Owner or Partner,
state which.)

Signature
of
Seller-
Mortgagee

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which said instrument of writing was then and there of the value of more than Fifty Dollars (\$50.00), and the prop- [fol. 7] erty of T. J. Wilson, and the said Billie Sol Estes did then and there obtain possession of and acquire the same as aforesaid, with the intent to appropriate the same to his own use, and with the intent of destroying and impairing the right of the said T. J. Wilson, the party justly entitled to the same in this, to-wit, the said Billie Sol Estes did then and there falsely pretend and fraudulently represent to the said T. J. Wilson that the said T. J. Wilson by signing and executing said instrument of writing was purchasing the property specified and listed in said instrument of writing, to-wit:

75—500 Gallon Superior NH3 Tanks Mounted on and together with

75— Wheel Superior Tanks Complete with Tires, Axles, Wheels and Hose Assemblies.

Serial No's. SF-17214-500 Thru SF-17288-500

65—Superior NH3 Applicators Complete With Regulators, Shanks, Knives, Hoses, and 65—200 Gallon NH3 Tanks.

Tank Serial No's. S304 Thru S368,

and that the said property, as listed and specified in said instrument of writing, secured said instrument of writing

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and was the security thereon, and did thereby fraudulently induce the said T. J. Wilson, who relied upon said false pretenses and fraudulent representations and believed them to be true, to sign and place his, the said T. J. Wilson's, signature on said instrument of writing and to deliver the possession of the said instrument of writing to him, the said Billie Sol Estes, when in truth and in fact the said T. J. Wilson was not purchasing the property listed and specified in said instrument of writing, and said property did not secure said instrument of writing and was not security thereon, and the said Billie Sol Estes then and there knew the said pretenses and representations were false; against [fol. 8] the peace and dignity of the State;

[fol. 151]

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF SMITH COUNTY, TEXAS

No. 16,818

[Title omitted]

COURT'S CHARGE AS SUBMITTED TO THE JURY

Members of the Jury:

In this case, the Defendant, Billie Sol Estes, stands charged by indictment duly presented in the 143rd Judicial District Court of Reeves County, Texas, and in the first count thereof, with the offense of swindling alleged to have been committed in the County of Reeves, State of Texas, on or about the 2nd day of March, 1961.

And in the second count thereof, with the offense of theft by false pretext alleged to have been committed in the County of Reeves, State of Texas, on or about the 2nd day of March, 1961.

And in the third count thereof, with the offense of theft by bailee, alleged to have been committed in the County of

Reeves, State of Texas, on or about the 2nd day of March, 1961.

This case has been duly transferred from the 143rd Judicial District Court of Reeves County, Texas, to this Court for trial.

To said indictment, and all three counts therein, the Defendant, Billie Sol Estes, has pleaded "NOT GUILTY".

All three counts of the indictment are being submitted to you in this Charge but in this connection you are instructed that you can find the Defendant guilty only on one count, in the event you find the Defendant guilty.

In arriving at your verdict on any one count in the indictment you are not to consider the guilt or innocence of the Defendant as to the other counts alleged in the indictment.

[fol. 537]

IN THE SEVENTH JUDICIAL DISTRICT COURT
OF SMITH COUNTY, TEXAS

No. 16,818

[Title omitted]

DEFENDANT'S BILL OF EXCEPTIONS No. 5—Filed
April 23, 1963

Be it remembered that upon the trial of this case, after the change of venue from Reeves County, Texas, to Smith County, Texas, the case was called and first came on to be tried in the 7th Judicial District Court of Smith County, Texas, before Hon. Otis T. Dunagan, Judge of Said Court, at 10 o'clock a. m., September 24, 1962.

Prior to the call of this case on said date, the defendants Counsel had received notice through the press that the Court upon the trial of the case would permit live television and radio coverage of the trial.

Thereupon the defendant through his Counsel, prior to the calling of the case, notified the Court that he desired to take up through his Counsel certain matters before he made appearance at the Courthouse and in the courtroom.

Whereupon when the Court convened certain proceedings occurred, prior to the personal appearance of the defendant at the Courthouse or in open court.

Said proceedings are set forth in the Statement of Facts of the Proceedings September 24-25, 1962, filed and approved in and by this Court on April 8, 1963, both as a Statement of Facts and as a Bill of Exceptions (page 2 to page 65, line 17). Said Statement of Facts and Bill of Exceptions is hereby referred to and made a part hereof as if copied in full herein.

Upon the calling of the case defendant through his Counsel objected to television, radio transmission, and live television transmission of the trial and its progress upon the grounds as fully set out in said Statement of Facts and Bill [fol. 538] of Exceptions of Proceedings of September 24-25, 1962, for the reasons as fully set out therein, and offered the testimony and Exhibits in connection with said objections and motions; all of which testimony and Exhibits are filed and approved as part of this Bill.

The Court overruled defendant's objections to the television, radio and cameras, as appears in said Statement of Facts and Bill of Exceptions of Proceedings of September 24-25th, 1962; and the defendant then and there in open Court excepted.

In connection with this Bill all pictures and exhibits offered in connection herewith are made part of this Bill and sent up as original exhibits.

Thereafter upon September 25th, 1962, the Court continued this case until October 22nd, 1962 for trial.

Thereafter upon October 2, 1963, the following press release was made by the Associated Press and printed in papers of general circulation in Tyler, Texas, in Smith County, Texas:

TYLER, TEX., OCT. 1 (AP)—DIST. JUDGE OTIS T. DUNAGAN RULED OUT LIVE TELECASTS AND LIVE BROADCASTING TODAY FOR MUCH OF THE

SCHEDULED OCT. 22 BILLIE SOL ESTES CASE ON THE GROUNDS THAT IT VIOLATES LAWS REGARDING WITNESSES.

BUT HE SAID CÁMERAS WOULD CONTINUE TO BE ALLOWED IN THE COURTROOM PROVIDED THE STATE BAR OF TEXAS DOES NOT HOLD AGAINST THEM.

THE JURIST SAID, "TELEVISION AND RADIO SHOULD BE GIVEN EQUAL TREATMENT WITH OTHER NEWS MEDIA INsofar AS THE LAW COVERING TRIAL PROCEDURE PERMITS. I BELIEVE IT WOULD BE THE RANKEST KIND OF DISCRIMINATION BETWEEN THE NEWS MEDIA TO REFUSE THESE TWO SOURCES OF REPORTING THE NEWS EQUAL ACCESS TO NEWS COMING FROM THE TRIAL OF LAWSUITS INsofar AS IT CAN BE DONE IN KEEPING WITH PROPER COURT PROCEDURE".

JUDGE DUNAGAN SAID, HOWEVER, THAT HE WAS NOTIFYING BOTH TELEVISION AND RADIO THAT LIVE 'CASTING WOULD NOT BE PERMITTED DURING THE QUESTIONING OF JURORS IN TESTING THEIR QUALIFICATIONS OR OF THE [fol. 539] WITNESSES' TESTIMONY.

TO GIVE SUCH PERMISSION, THE JUDGE SAID, WOULD VIOLATE THE TEXAS WITNESS RULE WHICH PROHIBITS ONE WITNESS FROM HEARING THE TESTIMONY OF ANOTHER.

JUDGE DUNAGAN SAID HE WAS MAKING THE RULING BECAUSE OF THE WITNESS RULE AND NOT BECAUSE OF ANY CRITICISM OF HIS PERMITTING LIVE COVERAGE OF PRELIMINARY LEGAL MOVES AT THE SEPT. 24-25 SESSION.

HE SAID THE TELEVISION AND BROADCAST COVERAGE WOULD BE ON A POOL BASIS AND DESIGNATED MARSHALL PENGRA, MANAGER OF KLTU-TV, TYLER, IN CHARGE OF THE POOL.

THE TEXT OF THE JUDGE'S STATEMENT:

"IN MY STATEMENT OF SEPT. 24, 1962, ADMITTING TELEVISION AND OTHER CAMERAS IN THE

COURTROOM DURING THE TRIAL OF BILLIE SOL ESTES, I SAID CAMERAS WOULD BE ALLOWED UNDER THE CONTROL AND DIRECTION OF THE COURT SO LONG AS THEY DID NOT VIOLATE THE LEGAL RIGHTS OF THE DEFENDANT OR THE STATE OF TEXAS.

"TELEVISION AND RADIO, BEING MEANS OF PRESENTING THE NEWS, SHOULD BE GIVEN EQUAL TREATMENT WITH OTHER NEWS MEDIA INsofar AS THE LAW COVERING TRIAL PROCEDURE PERMITS.

"I BELIEVE IT WOULD BE THE RANKEST KIND OF DISCRIMINATION BETWEEN THE NEWS MEDIA TO REFUSE THESE TWO SOURCES OF REPORTING THE NEWS EQUAL ACCESS TO NEWS COMING FROM THE TRIAL OF LAWSUITS IN THE COURTROOM INsofar AS IT CAN BE DONE IN KEEPING WITH PROPER COURT PROCEDURE.

"IN LINE WITH MY STATEMENT OF SEPT. 24, 1962, I AM AT THIS TIME INFORMING BOTH TELEVISION AND RADIO THAT LIVE BROADCASTING OR TELECASTING BY EITHER NEWS MEDIA CANNOT AND WILL NOT BE PERMITTED DURING THE INTERROGATION OF JURORS IN TESTING THEIR QUALIFICATIONS OR OF THE TESTIMONY GIVEN BY THE WITNESSES AS TO DO SO WOULD BE IN VIOLATION OF ARTICLE 644 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS, WHICH PROVIDES AS FOLLOWS: 'AT THE REQUEST OF EITHER PARTY, THE WITNESSES ON BOTH SIDES MAY BE SWORN AND PLACED IN THE CUSTODY OF AN OFFICER AND REMOVED OUT OF THE [fol. 540] COURTROOM TO SOME PLACE WHERE THEY CANNOT HEAR THE TESTIMONY AS DELIVERED BY ANY OTHER WITNESS IN THE CASE. THIS IS TERMED PLACING WITNESSES UNDER RULE.'

"IF THE JUDICIAL SECTION OF THE STATE BAR OF TEXAS, MEETING IN AUSTIN ON OCT. 5 AND 6, DOES NOT ADOPT RULE 35 OF THE CANON

OF ETHICS OF THE AMERICAN BAR ASSOCIATION AND CONTINUES TO PERMIT EACH JUDGE TO CONDUCT HIS COURT AND CONTROL HIS COURTROOM AS HE DEEMS RIGHT AND PROPER, AS LONG AS THE LAW IS COMPLIED WITH, IN THAT EVENT, EACH TELEVISION NETWORK AND LOCAL TELEVISION STATION WILL BE ALLOWED ONE FILM CAMERA WITHOUT SOUND IN THE COURTROOM AND THE FILM WILL BE MADE AVAILABLE TO OTHER TELEVISION STATIONS ON A POOLED BASIS.

MARSHALL PENGRA, MANAGER OF TELEVISION STATION KLTU, TYLER, WILL BE IN CHARGE OF THE INDEPENDENT POOL AND INDIVIDUAL STATIONS MAY CONTACT HIM. THE SAME WILL BE TRUE OF CAMERAS FOR THE PRESS, WHICH WILL BE LIMITED TO THE LOCAL PRESS, ASSOCIATED PRESS AND UNITED PRESS.

"THE ESTES CASE WAS CALLED FOR TRIAL IN TYLER ON SEPT. 24, AND WAS NOT THE FIRST CASE IN TEXAS WHERE TELEVISION AND OTHER CAMERAS WERE PERMITTED. THERE HAVE BEEN SEVERAL CASES IN MY COURT IN WHICH TELEVISION AND OTHER CAMERAS HAVE BEEN PERMITTED IN THE COURTROOM. ALMOST EVERY NIGHT ON TELEVISION NEWS PROGRAMS, I SEE PICTURES OF COURTROOM PROCEEDINGS THAT WERE FILMED IN THE COURTROOMS. THIS PRACTICE HAS BEEN GOING ON FOR SEVERAL YEARS IN MY COURT AND OTHER COURTS THROUGHOUT THIS STATE.

"THE ESTES CASE IS NOT THE FIRST IN WHICH LIVE TELEVISION FROM THE COURTROOM HAS BEEN PERMITTED. TO MY KNOWLEDGE, THERE HAVE BEEN TWO OTHERS, THE FIRST ONE SEVERAL YEARS AGO FROM WACO, A MURDER TRIAL, I BELIEVE. HOWEVER, TRIALS HERETOFORE TELECAST LIVE FROM TEXAS COURTROOMS WERE PERMITTED BY CONSENT OF BOTH PROSECUTION AND DEFENSE LEGAL COUNSEL, AND,

THEREFORE, ANY OBJECTION TO A VIOLATION OF ARTICLE 644 IN THIS RESPECT WAS WAIVED. SINCE THAT TIME, NEITHER THE STATE BAR OF TEXAS NOR THE JUDICIAL SECTION OF THE STATE BAR HAVE CONDEMNED SUCH PRACTICE. [fol. 541] I AM MAKING THIS STATEMENT AT THIS TIME IN ORDER THAT THE TWO NEWS MEDIA AFFECTED MAY HAVE SUFFICIENT NOTICE BEFORE THE CASE IS CALLED ON OCT. 22.

"THE RULES I HAVE SET FORTH ABOVE CONCERNING THE USE OF CAMERAS ARE SUBJECT TO CHANGE IF I FIND THAT THEY ARE TOO RESTRICTIVE OR NOT WORKABLE, FOR ANY REASON.

"AT THE BEGINNING OF THE ESTES TRIAL IN THIS COURT, I STATED THAT I HAD NOT INVITED EITHER TELEVISION, RADIO OR THE PRESS TO BE HERE, BUT THAT THEY WERE HERE. HOWEVER, ONE NEWS WIRE SERVICE, IN ITS REPORT, CARRIED IN NEWSPAPERS ALL OVER THE NATION, QUOTED ME AS HAVING SAID THAT I HAD INVITED TELEVISION, RADIO AND PRESS TO BE HERE. I AM TAKING THIS OPPORTUNITY TO CORRECT THAT ERROR AND REQUESTING THAT WIRE SERVICE TO MAKE THE NECESSARY EXPLANATION FOR THEIR MISTAKE."

The Judicial Cannon of the American Bar Association reads as follows:

"Judicial Canon 35, Improper Publicizing of Court Proceedings:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings (are calculated to) detract from the essential dignity of the proceedings, distracts (the) participants and witnesses in giving (his) testimony, (degrade the court) and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the Court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

[fol. 542] The above is the text of the Canon at the time of the trial, except the Special Committee on Proposed Revision of Judicial Canon 35 has made recommendations since this trial that the part in brackets above be deleted and the part underlined be added.

The American Bar Association Committee recommended that "The Canons of Professional Ethics and the Canons of Judicial Ethics as adopted by the American Bar Association, constitute the standards of policy recommended by the American Bar Association for consideration and voluntary guidance of the rule-making authorities of the states of the United States, and have the force of law only where voluntarily adopted and incorporated in state laws or as a rule of court. The Committee recommends that the rule-making authority of each state exercise the exclusive responsibility of adopting Canons of Ethics in the interest of statewide uniformity, ~~and avoidance of confusion and~~ pressure that have resulted in some jurisdictions where magistrates or judges have individually adopted rules concerning the conduct of their courts".

The State of Texas has not adopted a Code of Canons of Judicial Ethics, neither by Statute, rule, or action of Texas Judicial Conference. On October 4th to 6th, 1962, prior to the trial of this case on October 22nd, 1962, but after the proceedings on September 24-25th, 1962, the Texas Judicial Conference, an organization of trial and appellate judges in Texas, met in Austin, Texas. The Committee theretofore appointed and serving to consider the adoption of Canons of Judicial Ethics in Texas recommended the adoption of all the American Bar Association Canons of Judicial Ethics except Canon 35. The Conference refused to adopt said recommendation, but decided that the Con-

ference would continue to consider the feasibility of the adoption of a Code of Judicial Ethics in Texas, and to consider the matter further at the annual meeting in 1963. [fol. 543] The defendant objected to the televising and broadcasting of the trial for the reasons shown in the Statement of Facts and Bill of Excepts—September 24-25, 1962, approved and filed April 8, 1963, among the same being the following:

1. The live televising constituted an invasion of privacy of the defendant and his counsel, and deprived them of freely discussing in the courtroom their advice and matter of defense in regard to the case without having a picture taken while it was being done.
2. It was unfair in preventing the defendant from feeling at ease.
3. It placed undue emphasis upon some supposed special importance of this particular trial as opposed to ordinary justice in trials, and it was calculated to cause the jury to think there was something more important about this case and something more expected of them than in the ordinary case; this being timed particularly with reference to the publicity which had already gone with the cases.
4. It has a tendency to distract the attention of the jury while the pictures were being taken; and the jury would have a tendency at tense moments to be looking at the camera rather than at the witnesses and paying attention to what is being said.
5. It distracts the witness and causes them to be watching the camera.
6. It made it impossible for the defendant's counsel to give his attention to the case and to properly represent their client because of the distraction.
7. The presence of the cameras denied due process and a fair trial; there being eight cameras trained upon counsel at the time of the objection, including two large television cameras; and the floor being covered with wire within the rail; outside the Courthouse a large motor unit,

attracting the attention of the venire as they entered the courthouse.

[fol. 544] 8. The presence of the equipment was likely to and probably did emphasize to potential jurors that the press of public opinion on the case should be given weight in their verdict.

After the case had been continued the case was called again upon October 22nd, 1962, and the defendant again objected to live radio and television reporting of the trial. The proceedings occurred, appearing at pages 3 to p. 120, line 10, of the Statement of Facts on Preliminary Motions and Voir Dire of Thirty-Two Member Jury List, filed and approved as a Statement of Facts and Bill of Exceptions on April 8, 1963.

Defendant at said time renewed his objection to live television and radio broadcast of any of the proceedings as stated in said Bill of Exceptions immediately aforesaid, but the Court overruled such objections stating his ruling at length at page 3 and 4 of the Statement of Facts and Bill of Exceptions referred to in the last paragraph and overruled defendant's objections; to which the defendant then and there in open court excepted.

In connection with said objection defendant offered in evidence among other Exhibits the tape recording and two hour broadcast of the proceedings of September 24th, 1962, which was broadcast in Tyler, Texas, the night of September 24th, 1962, which original tape is sent up as an original Exhibit with the other Exhibits under order of the Court.

Thereupon the proceedings continued under live broadcast and television during the entire trial in accordance with the order of the Court.

The defendant offered in support of his objection additional testimony as hereinbefore referred to as contained in the Statement of Facts and Bill of Exceptions approved on April 8, 1963; and the exhibits in connection therewith, and all photographs taken with permission of the Court of the Courtroom, Courthouse and immediate vicinity; and the State offered certain Exhibits and photographs; all of

which Exhibits are filed and approved as part of this Bill and sent up as original exhibits.

[fol. 545] Prior to the argument the defendant made the following additional objection:

"Mr. Cofer: Now, Your Honor, we want again to object to television and photographs in the courtroom while the jury (trial) is still in progress. We object to any pictures taken while the arguments are going on, or while the jury is in the box, and we object to any television, live or simply pictures, and in the event the Court adheres to his announcement that has been made, we want to except to it; and then we want to make a special request that the argument for the two lawyers for the Defense not be photographed or not be televised, live or not be photographed, and that no pictures be permitted to be taken while Mr. Hume Cofer and myself are making ours."

The court then ruled as follows:

"I overrule your first request, but now, the last request is going to be granted, and now, I order that while Mr. Hume Cofer and while Mr. John Cofer are addressing the jury that the cameras not be on them, and all sound be turned off, and there will be no press photographers, pictures made of either of those gentlemen while they are addressing the jury; otherwise, you may proceed, but for those two, follow that order of the Court."

The defendant excepted to the part of the Court's order which overruled his motion.

The arguments proceeded, and during the arguments, opening and closing, for the State the arguments were broadcast live over radio and television with pictures and sound, the cameras being directly trained on the State's attorneys and the jury.

During the arguments of Mr. Hume Cofer and Mr. John Cofer, the cameras were not directed at them but at the Judge of the Court, and the arguments were monitored by audio equipment, and relayed by the voice of a news announcer live while the arguments were being made.

[fol. 546] The jury returned a verdict upon the first Count of the Indictment after sending in the inquiry as contained and set out in Defendant's Bill of Exceptions No. 4.

Wherefore Defendant tenders this his Bill of Exceptions No. 5 and prays that it be filed, and his exceptions noted and that the Clerk immediately call the trial judge's attention to the filing of this bill, and that it be allowed, as part of the record in this case.

J. Byron Saunders of Tyler, Texas; John P. Dennison of Pecos, Texas; Cofer, Cofer & Hearne of Austin, Texas, By John D. Cofer, Attorneys for Defendant, Billie Sol Estes.

The foregoing Bill of Exceptions No. 5 having been reduced to writing by counsel for defendant, and having been filed within the ninety-days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and I, having considered the same, and the same having been found by me to be correct, I hereby act thereon, and the same is hereby allowed, and approved as part of the record in this case, and it is ordered that such approval be noted as of the _____ day of _____, A. D. 1963.

_____, Trial Judge Presiding.

FILED: April 23, 1963

The foregoing Bill of Exceptions No. 5 having been reduced to writing by counsel for Defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and the Court having considered and examined the same, said Bill is refused this the 3 day of May, 1963 for the following reasons:

[fol. 547] This case was first set for trial in the 7th Judicial District Court of Smith County, Texas, for September 24, 1962 at 10:00 A. M.

Prior to the calling of the case for trial, the Defendant, through his attorneys, at 10:00 A. M. on said date pre-

sented his Motion that the telecasting, broadcasting by radio and photographing of the trial not be permitted. After hearing testimony concerning same and arguments of counsel, the Motion was overruled by the Court. The case was then called for trial, State of Texas announced ready and the Defendant filed his Motion for continuance upon three grounds; as is reflected by the transcript on appeal in this case, to which reference is made. After hearing arguments of counsel, the Court overruled Defendant's Motion on the first two grounds and sustained his Motion based upon the last ground, which was due to the absence of certain Defendant's witnesses, and the case was reset for trial for October 22, 1962 at 10:00 A. M.

The hearing which began on September 24th continued through September 25th, and live telecasting, radio broadcasting and press photography were permitted. However, the only matters considered were the Motion not to allow telecasting, broadcasting and press photography and Defendant's Motion for Continuance.

There were a few wires laid neatly along the floor next to the wall in the courtroom and there were a few wires across the floor but the floor was not covered with wires.

There was not any evidence or testimony offered on the merits of the case. The only testimony offered was in support of Defendant's Motion to prevent telecasting, broadcasting by radio or press photography.

Prior to the trial of October 22, 1962, there was a booth constructed and placed in the rear of the courtroom painted the same or near the same color as the courtroom with a [fol. 548] small opening across the top for the use of cameras, a picture of said booth being a part of this record and sent up as one of the original exhibits; and the Appellate Court is referred to said exhibit for its physical appearance.

Live telecasting and radio broadcasting were not permitted and the only telecasting was on film without sound, and there was not any broadcasting of the trial by radio permitted. Each network, ABC, NBC, CBS and KRLD Television in Tyler was allowed a camera in the courtroom, ABC having been represented by WFAA, Dallas, Texas,

CBS and KRLD, Dallas, and NBC by WBAP of Fort Worth. The telecasting on film of this case was not a continuous camera operation and only pictures being taken at intervals during the day to be used on their regular news casts later in the day. There were some days during the trial that the cameras of only one or two stations were in operation, the others not being in attendance upon the Court each and every day. The Court did not permit any cameras other than those that were noiseless nor were flood lights and flash bulbs allowed to be used in the courtroom. The Court permitted one news photographer with Associated Press, United Press International and Tyler Morning Telegraph and Courier Times. However, they were not permitted inside the Bar; and the Court did not permit any telecasting or photographing in the hallways leading into the courtroom or on the second floor of the courthouse where the courtroom is situated, in order that the Defendant and his attorneys would not be hindered, molested or harassed in approaching or leaving the courtroom. The Court did permit live telecasting of the arguments of State's counsel and the returning of the verdict by the Jury and its acceptance by the Court. The opening argument of the District Attorney of Smith County was carried by sound and because of transmission difficulty, there was not any picture. The closing argument for the State by the District Attorney of Reeves County was carried live by both picture and sound. The arguments of attorneys for Defendant, John D. Cofer and Hume [fol. 549] Cofer, were not telecast or broadcast as the Court granted their Motion that same not be permitted.

There was not any televising at any time during the trial except from the booth in the rear of the courtroom, and during the argument of counsel to the jury, news photography was required to operate from the booth so that they would not interfere or detract from the attention of either the jurors or the attorneys.

During the trial that began October 22nd, there was never at any time any radio broadcasting equipment in

the courtroom. There was some equipment in a room off of the courtroom where there were periodic news reports given; and throughout the trial that began October 22nd, not any witness requested not to be televised or photographed while they were testifying. Neither did any juror, while being interrogated on voir dire or at any other time, make any request of the Court not to be televised.

Otis T. Dunagan, Trial Judge Presiding.

The foregoing bill of Exception was returned to me by the Trial Judge on May 3, 1963, at 3:29 o'clock P. M.

Thomas E. Wall, Clerk, 7th Judicial District Court of Smith County, Texas.

FILED: May 3, 1963.

[fol. 550] On this 15th day of May, 1963, the Defendant hereby agrees to the reasons assigned by the Judge for refusing to approve Defendant's Bill of Exceptions No. 5, and accepts the Court's qualification thereof, and asks that his agreement thereto and acceptance thereof be noted.

J. Byron Saunders; John P. Dennison; Cofer, Cofer & Hearne, By /s/ John D. Cofer, Attorneys for Defendant.

The above agreement and acceptance of and by the Defendant, on this 15th day of May, 1963, within the time provided by Article 760 d, C.C.P., is hereby noted and Ordered filed and attached to said Defendant's Bill of Exceptions No. 5, and the Court's ground of refusal and qualification thereof.

Otis T. Dunagan, Judge Presiding.

Filed this 15th day of May, 1963.

Thomas E. Wall, Clerk, 7th Judicial District Court of Smith County, Texas, By Patsy Alfred, Deputy.

Recorded Vol. 8, p. 492, Minutes of the 7th District Court of Smith County, Texas.

[fol. 551]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

DEFENDANT'S BILL OF EXCEPTIONS No. 6—Filed
April 23, 1963

Be it remembered that upon the trial of this case that before the trial commenced, and before announcement, and before the commencement of the selection of the jury, defendant and his Counsel objected to proceeding to trial in accordance with the Court's ruling permitting radio and television broadcasting during the trial in the case, because participation of Counsel in such hearing violated the said Counsel's personal views of the professional duties and ethical conduct.

Live radio broadcasting by radio and television was to be and was permitted by the Court's order as appears in Defendant's Bill of Exceptions No. 5, and in the Statement of Facts also approved as a Bill of Exceptions of the Proceedings September 24-24, 1962, filed and approved April 8th, 1963, and the Statement of Facts also approved as a Bill of Exceptions on Preliminary Motions and Voir Dire, filed and approved April 8th, 1963, and in the Statement of Facts in the case, also approved as a Bill of Exceptions, filed April 8th, 1963.

Senior Counsel for defendant, Mr. John D. Cofer, before the beginning of the interrogation of the venire made the following statements and objections in substance.

He is a practising licensed attorney for forty-one years, and is licensed to practice in Texas, in the Supreme Court of The United States, in the Fifth Circuit, and in all of the Federal District Courts Divisions in Texas.

He is a member of the American Bar Association and has been for in excess of thirty years. All the members of his firm are members of the American Bar Association.

It was highly distasteful to him to be forced to defend a [fol. 552] man in a criminal case where cameras are trained

on him during the trial or any part of the trial. He believes sincerely in Canon 35 of the American Bar Association which prohibits photography or cameras in the courtroom.

He, since the proceedings of September 24-25, 1962 had given very serious consideration to asking the Court to relieve him from the necessity and duty of defending the Defendant in this courtroom in this case. He had consulted, with reference to that, with his client, his associates and other attorneys, since he considered it a personal matter. He reached the conclusion that to make such a request not only might possibly result in delaying the trial of this case but that it would have the effect of featuring this trial upon himself personally and might be construed as an effort to obtain some personal vindication and publicity in the trial.

So he had come to the conclusion that he was not justified in going to that extreme and so embarrassing this Court by refusing as an attorney to participate in something that violates his code of ethics very much.

To him, it is so highly improper for a lawyer, The Court, or any judicial proceedings to proceed under this character of publicity.

Such a trial is not, in his opinion, part of the protection of the First Amendment to the Constitution, but such amendment is for the protection of the defendant, and only two people, the State of Texas and the Defendant, have interests in the trial.

The situation in which said attorney was placed, according to his statement, seriously interferes with him in rendering his best services to his client. The fact that it outrages his personal ethics, colors his feelings and makes it difficult for him to the extent he feels he should be unable to pass wisely upon the rights of the Defendant in this case. [fol. 553] He does not think that he should be required to undergo a trial with publicity of this kind.

While the situation was substantially cleaned up from the proceedings of September 24-25th, 1962, still as defense counsel sits on the witness stand, the courtroom did not to him look like a courtroom, but like a moving picture theater.

Five cameras were seen by him shining out of the booth just as cameras do at a moving picture show at a theater.

The Court overruled the attorneys personal objection and adhered to his previous ruling as appears in Defendants Bill of Exceptions No. 6, and other Bills referred herein; to which action of the Court, defendant then and there in open Court excepted.

And defendant's exception to the action of the Court aforesaid having been overruled and noted, defendant tenders this his Bill of Exceptions No. 6, and prays that it be filed, and his exception noted, and that the Clerk immediately call the trial judge's attention to the filing of this bill, and that it be allowed, as part of the record in this case.

J. Byron Saunders of Tyler, Texas, John P. Dennison of Pecos, Texas, Cofer, Cofer & Hearne of Austin, Texas, By John D. Cofer, Attorneys for Defendant.

The foregoing Bill of Exceptions No. 6 having been reduced to writing by counsel for defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and I, having considered the same, and thereon, and the same is hereby allowed, and approved as part of the record in this case, and it is ordered that such approval be noted as [fol. 554] of the day of, A. D., 1963.

....., Trial Judge Presiding.

Filed: April 23, 1963.

The foregoing Bill of Exceptions No. 6 having been reduced to writing by counsel for Defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and the Court having considered and examined the same, said Bill is refused this the 3 day of May, 1963 because:

Live radio broadcasting or television was not permitted by the Court during the voir dire of the jury or during the taking of testimony. Even though the Court had ruled that live radio broadcasting and television would be permitted during the preliminary matters, neither was done. The only live radio broadcasting or televising of this trial which began October 22, 1962, was of the arguments to the jury of the District Attorneys of Smith County and Reeves County; and due to transmission difficulty, the opening argument by the District Attorney of Smith County was not carried by picture but only by sound.

As to whether the physical set-up for telecasting in the courtroom resembled Hollywood, the Trial Court refers the Appellate Court to Defendant's Exhibit 30, being a photograph of the booth on the opening date of the trial, October 22, 1962, and State's Exhibit 8, being a photograph of the same booth depicting the physical appearance of the booth upon the convening of court at 9:00 A. M. on October 23, 1962, which condition remained the same throughout the trial. The first day of the trial was consumed with motions and other preliminary matters and the jury panel did not report for duty until 9:00 A. M. [fol. 555] October 23, 1962, and the voir dire of the jury panel began upon the last date mentioned.

Otis T. Dunagan, Trial Judge Presiding.

The foregoing bill of Exception was returned to me by the Trial Judge on May 3, 1963, at 3:20 o'clock P. M.

Thomas E. Wall, Clerk, 7th Judicial District Court
of Smith County, Texas.

Filed: May 3, 1963.

On this 15th day of May, 1963, the Defendant hereby agrees to the reasons assigned by the Judge for refusing to approve Defendant's Bill of Exceptions No. 6, and accepts the Court's qualification thereof, and asks that his agreement thereto and acceptance thereof be noted.

J. Byron Saunders, John P. Dennison, Cofer, Cofer and Hearne, By John D. Cofer, Attorneys for Defendant.

The above agreement and acceptance of and by the Defendant, on this 15th day of May, 1963, within the time provided by Article 760 d, C. C. P., is hereby noted and Ordered filed and attached to said Defendant's Bill of Exceptions No. 6, and the Court's ground of refusal and qualification thereof.

Otis T. Dunagan, Judge Presiding.

Filed this 15th day of May, 1963.

Thomas E. Wall, Clerk, 7th Judicial District Court of Smith County, Texas, By Patsy Alfred, Deputy.

Recorded Vol. 8, p. 493, Minutes of the 7th District Court of Smith County, Texas.

[fol. 872]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

DEFENDANT'S BILL OF EXCEPTIONS No. 24—
Filed April 23, 1963

[fol. 878] Three counts went to the jury for deliberation, one on theft, one on swindling and one on embezzlement. Defendant had no way of knowing on which count the State relied for conviction nor did the jury, and defendant contended he was unable to present his case and make his arguments fully informed as to what count was being relied upon and under what theory the State sought conviction.

At the close of the arguments, the jury retired to the jury room in charge of a bailiff. In a very few minutes, before the Court had time to send the written charge to the jury and before the parties had time to complete the assembling of the Exhibits to send to the jury for its deliberations, the jury sent in a note to the Court inquiring whether the jury could convict defendant on all three counts.

The Court wrote instructions that the jury should read the Court's charge and follow the charge.

Defendant's exception to the action of the Court having been overruled, defendant tenders this his Bill of Exceptions No. 24 and prays that it be filed, and his exception noted, and that the clerk immediately call the trial judge's attention to the filing of this bill, and that it be allowed, as a part of the record in this case.

J. Byron Saunders of Tyler, Texas, John P. Dennison of Pecos, Texas, Cofer, Cofer & Hearne of Austin, Texas, By John D. Cofer, Attorneys for Defendant.

The foregoing Bill of Exceptions No. 24 having been reduced to writing by counsel for defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and I, having

considered the same, and the same having been found by me to be correct, I hereby act thereon, and the same is hereby allowed, and approved as part of the record in [fol. 879] this case, and it is ordered that such approval be noted as of the day of, A. D. 1963.

....., Trial Judge Presiding.

Filed: April 23, 1963.

The foregoing Bill of Exceptions No. 24 having been reduced to writing by counsel for Defendant, and having been filed within the ninety days from the notice of appeal in this case, as provided by V. Tex. C. C. P. 760d, and the Court having considered and examined the same, said Bill is refused this the 3 day of May, 1963 because:

This case was first called for trial in the 7th Judicial District Court of Smith County, Texas, on September 24, 1962 at 10:00 A. M. but did not proceed to trial. The case was continued on Motion of Defendant and by the Court reset for trial October 22, 1962 at 10:00 A. M. The Defendant was not called upon to plead in this court nor the indictment presented and no evidence on the merits of the case was offered until during the trial which began October 22, 1962.

The jury did send a note to the Court soon after retiring to the jury room to deliberate their verdict, as reflected by this Bill of Exceptions. However, the jury carried the Court's written Charge with them to the jury room upon retiring and had said written Charge with them at the time the note was sent to the Court. In so far as the exhibits were concerned, those called for by the jury were immediately sent to them.

Otis T. Dunagan, Trial Judge Presiding.

The foregoing Bill of Exception was returned to me by the Trial Judge on May 3, 1963, at 3:20 o'clock P. M.

Thomas E. Wall, Clerk, 7th Judicial District Court
of Smith County, Texas.

Filed: May 3, 1963.

[fol. 880] On this 15th day of May, 1963, the Defendant hereby agrees to the reasons assigned by the Judge for refusing to approve Defendant's Bill of Exceptions No. 24 and accepts the Court's qualification thereof, and asks that his agreement thereto and acceptance thereof be noted.

J. Byron Saunders, John P. Dennison, Cofer, Cofer & Hearne, By John D. Cofer, Attorneys for Defendant.

The above agreement and acceptance of and by the Defendant, on this 15th day of May, 1963, within the time provided by Article 760 d, C.C.P., is hereby noted and Ordered filed and attached to said Defendant's Bill of Exceptions No. 24 and the Court's ground of refusal and qualification thereof.

Otis T. Dunagan, Trial Judge Presiding.

Filed this 15th day of May, 1963.

Thomas E. Wall, Clerk, 7th Judicial District Court of Smith County, Texas, By Patsy Alfred, Deputy.

Recorded Volume 8, page 498, Minutes of the 7th District Court of Smith County, Texas.

[fol. 928] [File endorsement omitted]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

[Title omitted]

STATEMENT OF FACTS—September 24-25, 1962

[fol. 929]

APPEARANCES:

Hon. Otis T. Dunagan, Judge Presiding.

Representing the State of Texas,

Hon. R. B. McGowen, Jr., District Attorney, Monahans,
Texas:

Hon. Frank Maloney, Assistant Attorney General, Aus-
tin, Texas:

Hon. Weldon Holcomb, Crim. District Attorney, Tyler,
Texas:

Hon. H. D. Glover, County Attorney, Pecos, Texas.

Representing the Defendant,

Hon. John D. Cofer, Hon. G. Hume Cofer, Austin, Texas:

Hon. John P. Dennison, Pecos, Texas:

Hon. J. Byron Saunders, Tyler, Texas.

[fol. 930] Be It Remembered: That heretofore, to-wit, on
the 24th day of September, 1962, there came on for trial
the foregoing entitled and numbered cause, whereupon all
matters presented to the Court were as follows, to-wit:

By the Court: Gentlemen, I understand that before the
case is called for trial, and before we go into the trial of

the case set this morning, Defendant has a Motion that he desires to present to the Court at this time.

Mr. John D. Cofer: May it please the Court, I will state, generally what the grounds are and she can take it down and then we will reduce it to more formal grounds, but will not add anything to it.

The Court: That will be all right.

**MOTION THAT NO PHOTOGRAPHY OF ANY KIND BE PERMITTED
AND COURT'S INSTRUCTIONS THEREON**

Mr. Cofer: We would especially like to move, Your Honor, this morning that during the trial of this case and the preliminary hearings, such time as the Defendant is in the corridors of this court house and in this court room that no photography of any kind be permitted.

[fol. 931] Mr. McGowen: Your Honor, might I interrupt just a minute. I don't see the Defendant here. I am wondering about the requirement of his presence.

Mr. Cofer: We have explained that to the Court.

The Court: That is the reason I stated that we have not gone into trial. I have not called it for trial.

Mr. Cofer: The Defendant will be here as soon as the Motion is disposed of. It will be rendered; we think, largely useless if he came in here at this time.

We have to move that there be no photography, either television or moving pictures or still photography, and particularly flash light photography, in the court room or in the corridors where the venire gather for the reason:

First: That we can see that the taking of pictures of the attorney and the Defendant in the court room while we are sitting here during the trial, and we have been informed or heard over television, that it is planned to televise this live, that that is an invasion of the privacy of the Defendant and his counsel, and that it deprives them of freely discussing in the court room their advice and matters of defense in regard to the case without having a picture taken while it is being done. We further think that it is unfair to the Defendant because it places him in a condition where he cannot be freely at ease. We also think

that it tends to put undue emphasis upon some supposed special importance of this particular trial as opposed to ordinary justice in trials; and it is calculated to cause the jury to think there is something more important about this and something more expected of them than in the ordinary case. That is particularly true with reference to the publicity which has already gone with this case.

Now, we have here, which—we haven't brought it in the court room yet, but it will be brought in and identified later, twelve volumes that are about eight inches thick, I would say, and ten by twelve in size, which contains what we have been able to secure through services of the publicity that has been given this case in Texas and throughout the nation. We think that, taken with that publicity, that it tends to render it difficult for the Defendant, and impossible for the Defendant to get a fair and impartial trial. [fol. 933] For the additional reason, that it has a tendency to distract the attention of the jury while the pictures are being taken; that they have a tendency in the tensest moments to be looking at the camera rather than at the witness and paying attention to what is being said. That it also distracts witnesses and causes them to watch the cameras.

Also, speaking as an attorney—and I don't necessarily intend this for the record—but I know that I am getting cranky, Your Honor, in my old age because I continually dream that I am cranky, and I have always heard that when you dream a thing, that it expresses your true nature. So, perhaps, I am getting cranky, but motion pictures and the grinding of cameras while I am interrogating or cross-examining witnesses makes it almost impossible for me to give my attention to the case and to properly represent my client.

Now, we urge this Motion as a matter of due process and we think the evidence will show in this case that maybe there are two televisions, either stations or channels, or something here; there are one, two, three, four, five, six, seven, eight cameras trained on me now. I see the floor [fol. 934] covered with wires; there is an outside, to attract the attention of the venire as they come in, a motor

unit like they have at football games; and we conceive that the cooperation of the County officials in permitting this type of publicity amounts to an action of the State, through its properly constituted officials, of denying to this Defendant his rights and civil rights of due process to equal protection of the law guaranteed to him by the Constitution and the Amendments—Constitution of the United States and particularly the Fourteenth, and in particular, denies him the rights that are guaranteed to him by the Civil Rights Statute which prohibits the Defendant from being deprived of any rights to the action of State authorities; and our understanding here, that, with Your Honor's consent, there is a radio outside. I don't know to what extent that would interfere with the progress of the trial. Certainly, if those people don't come in here and speak over the microphone, the venire will not see that. I spoke to Your Honor about the newspaper men being within the Bar, seated in the court room. I think the newspaper men will conduct themselves properly, and certainly would not [fol. 935] want them moving about to such an extent or any sort of discourse over there. The ones I know I am sure would demean themselves properly and while that, to some extent, might detract the jury, they might get used to it, but I can't believe they will get used to all of these cameras. I never have. It has been going on for twenty years and I have always insisted on it and in only one case was I did I object to it, in which case it was not reversed on that ground.

Thank you, Your Honor. Now, we will reduce that to proper form later on.

The Court: Let me make this statement. You referred to cameras on the outside of the court house with the permission of the Court. I want to say I did not grant that permission. I do not have any jurisdiction out there.

Mr. Cofer: I think you must have misunderstood me there. So far as we are concerned, we can't keep them from taking pictures out there. The Defendant is not going to attack any camera man. He is going to take it very calmly, but it is the continually photographing of the Defendant in the presence of the jury and the venire that has a ten-

[fol. 936] dency to make the jury feel that this is something special; and it is just an ordinary case. It is a case where a man is accused of having either swindled or stolen from another individual and it could only justify and rate this publicity because of some special significance which has been given it by sources and matters which are so improper to be brought into the court room, that in our opinion, Your Honor should not countenance; and for that reason, we have stated, Your Honor, in a letter heretofore our position. We have stated to Your Honor this morning that Mr. Estes is now awaiting whatever decision is made of this and he will be here immediately.

Thank you, Your Honor.

Mr. McGowen: Your Honor, we feel that Mr. Cofer over-stated the degree to which this type of coverage will interfere. However, we would like to say that we, of course, would not be interested in anything that would interfere with the trial of this case. It is a matter within Your Honor's sole discretion, and I assume it has been given some thought how it could be handled without interference. [fol. 937] The Court: Anything further on the Motion from any one?

Mr. Hume Cofer: That is all.

The Court: I want to say to Mr. Cofer that I appreciate your advising me some week or more ago that you would file this Motion which gave me time to do much thinking about the matter.

In the past, it has been the policy of this Court to permit televising in the court room under the rules and supervision of the Court. Heretofore, I have not encountered any difficulty with it. I was unable to observe any detraction from the witnesses or the attorneys in those cases. We have watched television, of course, grow up from its infancy and now into its maturity; and it is a news media. So I really do not see any justified reason why it should not be permitted to take its proper seat in the family circle. However, it will be under the strict supervision of the Court. I know there has been pro and con about televising in the court room. I have heard some say that it makes a circus out of the Court. I had the privilege yes-

terday morning of sitting in my home and viewing a sermon by the First Baptist Church over in Dallas and certainly it wasn't any circus in that church; and I feel that if it is a proper instrument in the house of the Lord, it is not out of place in the court room, if properly supervised.

Now, television is going to be televising whatever the scene is here. If you want to watch a ball game and that is what they televise, you are going to see a ball game. If you want to see a preacher and hear a sermon, you tune in on that and that is what you are going to get. If the Court permits a circus in this court room, it will be televised, that is true, but they will not be creating a circus.

Now, the most important point is whether or not it would interfere with a fair and impartial trial of this Defendant. That is the most important point, and that is the purpose, or will be the primary purpose of the Court, to insure that he gets that fair trial.

I want to lay down these rules on photographing, televising of any character of camera, that you will not be permitted inside the Bar with your camera. You must move outside the Bar, all of you. This gentleman here inside, except the one camera over here on my right. This gentleman here, I don't know who he is with—
[fol. 939] Gentleman: KRLD-TV.

The Court: KRLD. I am going to let you set yours up on the outside, just opposite from—over the Bar from where you are there, and this one camera over in this corner out of the way of the activities up here. To you who have cameras that make a noise, if at any time during this trial, any lawyer complains to me that the camera noise is interfering with him whatsoever, then you will have to cease using that camera because we are here primarily to try this case. There is not anything the Court can do about the interest in this case, but I can control your activities and your conduct here; and I can assure you now that this Court is not going to be turned into a circus with TV or without it. Whatever action is necessary for the Court to take to insure that, the Court will take it.

Under proper supervision, I am unable to see how it would prejudice the Defendant for the public to actually look in and get an eye-view of what is actually going on. They are going to be reading about it in the newspapers; they will be hearing about it on radio and I do not care [fol. 940] to discriminate between the news media; but I expect your cooperation to the fullest extent.

Now, further: there will not be any cameras, any photographs on the second floor of this court house, outside of this court room at any time. This Defendant is entitled to the protection of this Court in getting in and to the court without being molested or harassed in the least; and I am going to do my best to give him every protection that I think he is entitled to, at the same time recognizing the responsibility that the news media has to the public. I realize your responsibility but I want you to realize, on the other hand, that you too have a responsibility to this Court in cooperating with it, that the dignity of this Court will not be impaired or the decorum upset.

Now, from time to time, there may be other instructions necessary for me to give you along that line. There will be officers stationed along to see that this order is enforced, and I might add that this is an order of the Court, and any willful violations of it, you will be in contempt of court, in the hallways on this second floor or in here. The [fol. 941] jurisdiction of this Court does not extend beyond these corridors on this floor, being in and around in this court room.

So, I expect your cooperation to see that we have an orderly, conducted trial. If at any time during this trial, the privileges that I have permitted are abused, they will be withdrawn immediately because I say again, we are going to see that this case is conducted orderly and this Defendant gets every right that I feel he is entitled to. I am going to do my best to insure that.

Let me give you these further instructions:

At the request of the Defendant, I am going to ask that you that have press, radio or TV badges on, that you remove them and keep in your pocket to identify yourself

when called upon. It is suggested, of course, that that might give undue emphasis to the publicity of the case when they see that number of badges. I am going to grant that privilege, so put those in your pockets so that you may identify yourself when called upon to do so.

Mr. Cofer: Your Honor, we would like the opportunity of making some record with some testimony in connection [fol. 942] with this and we deem it probably proper for the Defendant to be here. If the Court will give us a short recess, we will call him. In the meantime, we have asked Your Honor's permission that we too might have a photograph of this array of cameras, that we can take pictures.

The Court: You may have; and while the court takes a recess for the Defendant to arrive, you that do not have your press, radio and TV badges, you will go across the hall to the District Clerk's office and pick it up, please, so that you may identify yourselves. Keep it in your pocket unless called upon to exhibit it.

Reporter's Note: Appearances are called for and given at this point in the record, as shown on Page 1.

The Court: Is that all of the appearances?

Mr. Cofer: Yes, sir.

The Court: There has been one consideration that the Court has given and it is that this is a small court room and there will be hundreds of people trying to get into this court room to witness this trial. I believe we would have [fol. 943] less confusion if they would stay at home and stay out of the court room and look in on the trial. With all of those people trying to crowd in and push into this court room, that is another consideration I have given to it.

How much recess do you think we should have?

Mr. Cofer: Just as soon as Mr. Estes gets here.

The Court: Fifteen or twenty minutes?

Mr. Cofer: Fifteen minutes.

The Court: Take fifteen minutes' recess.

Following Intermission, 10:50 A. M.

Mr. Hume Cofer: May it please the Court, we have some testimony to offer in support of our Motion that the cameras and television sound equipment be removed from the court room; and we first call Mr. M. E. Danbom.

M. E. DANBOM, being by the Court duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

[fol. 944] Examination.

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. M. E. Danbom, D-a-n-b-o-m.

Q. Where do you live, Mr. Danbom?

A. Here in Tyler.

Q. How long have you lived in Tyler?

A. Thirty years.

Q. What is your occupation?

A. Manager for Radio Station KTBB.

Q. Here in Tyler?

A. Yes, Tyler.

Q. Tell me what equipment and employees you have here in Tyler this morning, here in and next to the court room.

A. We have a news man, Chuck Foster, our Chief Engineer, Bob Wildman and myself in personnel. We have microphones in the court room here. The wiring to them is concealed and the microphones are on this witness stand—

Q. And on the Judge's Bench?

A. The Judge's Bench and there is one facing the table there for the attorneys when they address the Court.

Q. Where is your other equipment other than the micro-
[fol. 945] phones?

A. The equipment is in the anteroom, outside of the court room, to my right.

Q. Through this door next to the jury box?

A. Through the door to the hallway, yes.

Q. Now, that equipment of yours is right next to the door through which the jurors must pass in entering and leaving the court room in the jury box, is it not?

A. It is between the door and the corner in that room, yes, sir.

Q. Then in that other room, there is another radio system which has a desk with equipment on it?

A. That is correct.

Q. In the same room?

A. Yes.

Q. Would you judge the size of that anteroom to be about 10 x 10?

A. At least that,—I believe and perhaps a little larger.

Q. Now, tell me what the purpose of your radio equipment is and what will it accomplish?

A. We will broadcast the trial that has started here this morning.

[fol. 946] Q. Will you broadcast it live?

A. We plan to broadcast it live, and direct, yes, sir.

Q. Are we on the air now?

A. We are.

Q. What radio stations are receiving this broadcast through your equipment?

A. At the present time, only Radio Station KTBB. Others probably would be connected if they request it. We have agreed to feed any other stations that might want it.

Q. In other words, you will serve it to any other radio stations that contact you for a fee?

A. That is correct, so that only one microphone and one set of equipment would do for many.

Q. How many such tentative arrangements do you have?

A. No tentative arrangements. It is merely available if they request it.

Q. Will any of the major networks use your equipment?

A. We have had no requests for that, no.

Mr. Cofer: Your Honor, we would like for the record to show that Defendant did arrive before this testimony began [fol. 947] and has been in the court room during this part of the proceedings.

The Court: All right. Let the record be clear and show that Defendant has been here since Court reconvened after the recess and has been here continually since then.

Mr. Cofer: That's right. Mr. Bruce Neal!

BRUCE NEAL, being first duly sworn by the Court to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Tell me your name, please, sir.

A. Bruce Neal.

Q. Mr. Neal, what is your occupation?

A. Radio news reporter.

Q. Where do you live?

A. Fort Worth.

Q. By whom are you employed?

A. KXOL Radio.

Q. Are there other radio stations associated with or affiliated with KXOL?

[fol. 948] A. Yes, the member stations of the Wendell Mayes group.

Q. How many stations?

A. Six stations in Texas.

Q. Six stations in Texas?

A. Yes.

Q. How many people are here for those stations today?

A. There are two of us, myself and Ed Dunagan from our station KNOW in Austin.

Q. What equipment do you have?

A. We have a tape recorder which is hooked into the court room public address system, telephone equipment for feeding our stories from, the anteroom here, and that is the extent of our electronic equipment.

Q. What microphones do you have here in the court room?

A. The regular court room microphones, witness microphone and the microphone on the Judge's desk.

Q. During the recess, you went on the wires with a story about the proceedings here in the court room just before the recess, did you not?

A. Yes.

[fol. 949] Q. You will have another one—when does your next story go out?

A. One each hour.

Q. And your equipment is in this same anteroom here with Mr. Danbom?

A. It is.

Q. Through which the jurors must pass in order to reach the jury box and depart from the jury box?

A. I don't know that from my own knowledge.

Q. If you will, look around and notice the entrance to the jury box is immediately adjacent to the entrance to the room in which your equipment is located; is that a fair statement?

A. Yes, the jury box is adjacent to it.

Mr. Cofer: I believe that's all, Mr. Neal.

Mr. McGowen: No questions.

JIM PRATT, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

[fol. 950] The Court: Mr. Cofer, at this time, I am not sure the jury will be going through that room. Time will tell on that point.

Mr. Cofer: Later, the proceedings will indicate.

The Court: That's right.

Examination.

By Mr. Cofer:

Q. Your name is Jim Pratt?

A. That's right, sir.

Q. Mr. Pratt, directing your attention to the area of ingress and egress through the main door of the court room here, estimate, if you will, the number of people who are standing in the aisles between the entrance to the Bar and the main door.

A. I am pretty bad at estimating. I would say thirty to thirty-five, perhaps.

Q. Estimate the number of cameramen that you see from the entrance to the Bar and the main door of the court room.

A. All camera, sir?

Q. Yes, sir; any kind of camera.

A. Approximately, a dozen.

[fol. 951] Q. And the thirty-odd people or perhaps to the left that you mentioned between here and the door appear to be standing in the aisles; is that true?

A. Yes, sir. They are privileged spectators as far as I am concerned. I don't know.

Q. Where do you live?

A. I live in Dallas.

Q. And what is your occupation?

A. I am Operations Manager of WFAA-TV.

Q. In Dallas?

A. Yes, sir.

Q. Do you have some equipment here today for the purpose of this trial?

A. Yes, sir, we sure do.

Q. What equipment, first, tell me, do you have in the court room?

A. We have two television cameras. We have about four microphones.

Q. Where are your microphones located?

A. One of them, I think—I am not the technician on the job, but I think one of the microphones is here at the witness stand and the others probably at the Judge's desk. [fol. 952] There is one here before you, between you and the witness and there is one pointed towards the jury close to the camera.

Q. There is one here immediately in front of me, about five or six feet from my face; is that right?

A. That's correct.

Q. There is one at the edge of the jury box which extends to and over the Bar of the jury box; is that correct?

A. That microphone will probably be moved, yes, sir.

Q. You say that microphone will probably be moved?

A. Yes, sir. It probably will not be aimed directly at the jury box as it is right now.

Q. Is that a very sensitive microphone?

A. It is—I am sure I couldn't tell you, sir, being technical about it, but it is a pretty sensitive microphone, yes, sir.

Q. Who is the man in charge of your sound equipment who would know the technical details of it?

A. I would recommend probably Chris Irby, our Chief Engineer on the job.

Q. Will you ask him to come up when you get through?

A. Yes, sir.

[fol. 953] Q. Then, Mr. Pratt, in addition to the four microphones and two television cameras that you have here in the court room, what other equipment do you have in or near or around the court house?

A. We have a television camera on the sidewalk, sir. We showed some shots of Tyler this morning. We have a cruiser, mobile cruiser, that controls all of the cameras and microphones.

Q. That cruiser is a large moving van type vehicle, is it not?

A. It is approximately forty-one feet long. It would be in the order of a Greyhound bus.

Q. It is painted blue?

A. Yes, sir.

Q. And has the identification letters of your station on the side in large letters?

A. That is right, sir.

Q. And is parked in front of the court house now?

A. Parked to the side, yes, sir.

Q. To one side. Your cameras are located in the court room, are they not—one between the Bar and the end of the jury box?

A. That's right, sir.

Q. And one is trained on you now?

[fol. 954] A. I think it is.

Q. Is it broadcasting now?

A. It is hard to say, sir. We have killed the camera lights, sir, so we don't know which camera is on.

Q. Then there is another one in the other direction, to your left, on a high stand with a ladder at the other side of the court room?

A. Yes, sir. It is just a stand. That is the man's chair that I think you refer to as a ladder.

Q. That camera extends up about half the height of that window, does it not? About twelve or fifteen feet above the floor?

A. I would say ten feet, yes, sir.

Q. Ten feet above the floor. And there is a man standing there on the platform operating that camera?

A. Yes, sir.

Q. Now, that camera is several feet above your head and my head and looking down on us, is it not?

A. Yes, sir.

Q. It is arranged, is it not, so that it is possible for that camera to look down on and focus on the counsel table?

[fol. 955] A. Yes, sir, that's true.

Q. And it is entirely possible for that camera to take a close-up of pieces of paper and documents that are lying on the counsel table?

A. I doubt that, sir. I don't think that lens on there is that sensitive, but we could check that for you.

Q. It is arranged, is it not, so that it can take a picture, an accurate picture of what is on the counsel table and every gesture and motion of the Defendant and his attorneys?

A. Yes, sir, with some limitations, depending on the seating arrangements.

Q. Then, in the event that the angle of that camera is wrong, there is another camera in the other direction that can take the Defendant and his attorneys from that direction?

A. That is true, yes, sir.

Q. The camera on the other side of the room has to look over a corner of the jury box and past the jurors to be aimed at the witness box, does it not?

A. I think that is pretty clean, sir. I don't think the [fol. 956] jurors would be in the way there.

Q. You don't think the jurors would get in the way of your operations?

A. I don't mean that exactly, sir.

Q. Now, tell me something about the distribution of this news that you are putting out over those cameras; who will be using it?

A. Well, the facilities were made to all three networks.

Q. Which networks are those?

A. ABC, CBS and NBC.

Q. And they are all using these two cameras; is that correct?

A. Yes, sir, to some extent. Some of them will be taped and shown at later times. Others will probably be picked up and fed to their local points and what their use of it is, I don't know.

Q. It is possible, is it not, to put it out live to any of the networks who want to use it right now?

A. That is correct, yes, sir.

Q. And you are, at least, recording everything that is occurring right now?

A. Yes, sir. Right this minute, we are.

[fol. 957] Q. And you may be putting it out live right now to any one who wants to use it?

A. That is correct.

Q. You are not sure whether you are or not?

A. I dare say that we are putting it out live to WFAA-TV in Dallas and to the station here in Tyler, KLTU.

Q. So that, at least, two stations are on the wire live now?

A. That is correct, yes, sir.

Q. And perhaps more?

A. That is true.

Q. What is your estimate of the number of TV sets served by those three networks?

A. I would hate to hazard a guess, but it would be in the tens of thousands, I guess.

Q. Wouldn't it be in the millions, Mr. Pratt?

A. Including the network services, most certainly, yes.

Q. These cameras in this court room are arranged by cables so that, for practical purposes, they can reach every television set in this country, is that right?

A. That is true, yes, sir. I would say any stations served by network.

Q. Any station serviced by network?

A. That is true.

Q. I didn't ask you about your crew. How many people, how many employees are working with you on this project?

A. We have approximately fifteen people here, sir, give or take one or two.

Q. And that is sound people and camera people?

A. That is all inclusive. That is our cameramen, technicians, director, our microphone men, yes, sir, tape men.

Q. Now, there is a camera right by your large camera at the end of the jury box—

A. That is another gentleman—

Q. —not asking whether it is yours, but do you know anything about it?

A. No, sir, I do not.

Q. Do you know this gentleman, Mr. Duke, who is operating the camera beside you?

A. No, sir. He looks familiar but I don't know him.

Q. Anyway, that large camera will stand a foot or two higher than yours but is not a part of your equipment?

[fol. 959] A. No, sir, it isn't. I don't know of any film cameras or sound on film that we have in the court room, on either of these stations.

Q. One or two of your associates have cameras out here on film sound, don't they?

A. I don't know what you mean by associates, sir. You mean our affiliate networks?

Q. Some of these affiliated people who are affiliated in this pool?

A. Yes, sir, I think I met a CBS man here.

Q. CBS has a camera back here in addition to your pool facilities?

A. Yes, sir, that is true.

Q. You are making a permanent tape of everything that transpires here in the court room and goes out over the live wire?

A. Today, yes, sir.

Q. Would you ask Mr. Irby to come in?

A. Am I excused?

Q. Yes, sir; that is all the questions I have for you.

Witness excused.

[fol. 960] J. C. IRBY, JR. being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Cofer:

Q. Your name is J. C. Irby?

A. J. C. Irby, Jr.

Q. As you stepped up, Mr. Irby, how many cameras did you hear grinding?

A. Well, as I sat down in the witness stand, probably one or two.

Q. You could hear the click and the grind of the camera?

A. Yes, sir.

Q. From where you are now in the witness box?

A. Yes, sir; very low but I could detect it.

Q. Will you estimate the number of cameras of all types that you can see facing you right now?

A. Probably ten. Ten or twelve. That estimate may be a little high.

Q. What is your occupation?

A. I am Chief Engineer of WFAA Radio and Television.

Q. Is that in Dallas?

A. Yes, sir.

[fol. 961] Q. You live in Dallas?

A. Yes, sir.

Q. How long have you been with WFAA?

A. About fifteen years.

Q. Tell us what equipment you have here in the court room.

A. Well, the only thing we have in the court room are the two TV cameras and microphone on the Judge's Bench and one mike over by the jury box and this mike here.

Q. When you say this mike here, you are pointing to the one facing the witness stand?

A. Yes, sir.

Q. How many microphones including the Court Reporter's equipment do you see facing the witness stand?

A. There are four.

Q. And there seem to be four or perhaps five including the Court Reporter's on the Judge's Bench?

A. Yes, sir.

Q. And there is one in front of the witness box facing the counsel table?

A. Yes, sir.

[fol. 962] The Court: To make that clear, there are only three on the Judge's Bench. This (indicating mike) is my permanent one here. Only three others besides my own mike.

Mr. Cofer: I am sorry, Judge. I meant including the court equipment. Other than—I wasn't sure that was court room equipment.

The Court: That (indicating) is the Court Reporter's.

Mr. Cofer:

Q. Tell me what kind of microphone that is back there at the edge of the jury box with the snout about twelve inches long, sticking out from it.

A. Sir, that is an electro-voice six-forty-two microphone.

Q. What is its purpose?

A. More or less a directional mike. In other words, the pattern on that mike is a directional pattern, cuts out noises from behind the mike and picks them up in front.

Q. It is arranged so that it can be aimed or pointed in any [fol. 963] direction in the court room or to any place in the court room?

A. Yes, sir, it can. I am not familiar with how they intended to use this microphone.

Q. But it is fixed so that it can be aimed any way?

A. Yes, sir.

Q. And now, it is aimed at the jury box?

A. At the way it is aimed right now, I don't think it would get much of a pickup. It is possible.

Q. It is turned down right now about a couple of inches?

A. Yes.

Q. But the lateral direction is in the jury box?

A. Yes.

Q. For the purpose of picking up sounds in the direction in which that microphone is aimed, it is a very sensitive microphone, is it not?

A. Sir, it isn't any more sensitive than most microphones except for the directional characteristic. This is the type microphone we use where we have sound noises, etc. behind it.

Q. This microphone is designed to eliminate everything except the particular part that you want to hear?

[fol. 964] A. Well, let's say in a bi-directional pattern. In other words, the microphone can't be sharp enough to just pick up, say, your voice or one of the juror's voices. It will be probably—I would estimate 180-degree pick up in front of the mike, or maybe a little smaller than that.

Q. It is sensitive enough, is it not, and this microphone directly in front of me, is sensitive enough, is it not, that it is entirely possible that either of them or others could pick up what is said at the counsel table?

A. That would be a hard question to answer, sir. It would depend on the other noises in the court room, papers, shuffling, etc.

Q. I said that is a possibility?

A. It is possible, yes, sir.

Q. So that those that arrange conferences between Defendant and his attorneys could be recorded through those microphones?

A. I suppose it would be possible. That is all I could say on that.

Q. And your cameras, of course, are arranged so that they have the full scan of the room including the counsel table, witness box, jury box and the judge's Bench?

[fol. 965] A. Yes, sir.

Q. And it is possible for this high camera to my right and to your left to look down on the counsel table and to look down into the faces of the jury?

A. Yes, sir.

Mr. Cofer: Pass the witness.

Mr. McGowen: No questions.

INSTRUCTIONS BY THE COURT

Let me give these further instructions with this testimony. All of you cameramen and television, and the particular ones I have in mind, any time the lawyers are con-

ferring here at the table with their client, you shall not pick up their conversations. If it is necessary to cut your mike off or your television off, it is going to be necessary to do it. I do not want you picking up any conversation in conference with the attorneys.

MEMBERS OF PRESS CALLED

Mr. Cofer: Excuse me just a moment, Your Honor. [fol. 966] Rather than identifying on the witness stand each of the representatives of the press who are here, Your Honor, the attorneys for the State have suggested that I just state to the Court the results of my conversations with each of these gentlemen this morning as to their names and identification.

Mr. Danbon, who testified has with him, as he said, Mr. Chuck Foster and Mr. Bob Wildman of KTBB in Tyler.

Mr. Oscar Griffin is here from the Houston Chronicle.

Mr. Ed Dunagan and Mr. Bruce Neal are here from the main stations, six of them in Texas.

Mr. Norman Richardson is here from Shreveport Times.

Mr. George Connor is here from Tyler Courier Times.

Mr. Clyde Walter from the Amarillo Globe News.

Mr. Lee Webb from Amarillo, cameraman, from KGNT-TV Station.

Mr. Fred Pass from the Dallas Morning News.

[fol. 967] Mr. Finis Mothershead from Associated Press.

Mr. Ken Grant and Mr. R. R. Sullivan and Mr. Dan Robinson and Mr. Jim Pratt are apparently among the fifteen people associated with the television equipment. There is Mr. Dan Wrather, or Don Wrather, Dan Wrather, I believe, with the Columbia Broadcasting System, has a crew of three people here, with a stand-by camera and sound man; the cameraman's name is Mr. Rubenstein. They have what they call four-hundred equipped sound on film equipment.

The Court: What station is that?

Mr. Cofer: CBS, Judge. They have with them their pilot Mr. Hudson who flew them in here.

Wayne Hogan of Channel 7 in Tyler, the only one in the building at the time I talked to him. He says there are other representatives outside of the building.

Jimmy Banks of the Dallas Morning News.
 [fol. 968] Julius Dusché of the Washington Post.
 Homer Bogart of the New York Times.
 Paul Mehan, Channel 7, Shreveport.
 Bill Clayton, United Press International.
 Betty Kittrell was wearing a press card and assisting with the press.

"Jerry McNeill with United Press.
 Langston McEachern of the Shreveport Times.
 Bill Duke, KRLD in Dallas, film and sound only.
 Fred Kaufman, Associated Press.
 Tom Dillard with the Dallas Morning News, who was behind the Judge's Bench this morning taking pictures, while my partner was making our original Motion.
 Lee Webb, KGNT, Channel 4 Amarillo.
 Marybeth Vaughn, one word, Tyler Star.
 Bill Young, KDOK, Tyler.

Don Goodwin of the Los Angeles Times; and we would like the permission of the Court to add any others who [fol. 969] register with the Clerk, as I believe they have been asked to, that I may get a list of those. Those are just the ones here around in this immediate area of the court room this morning and does not include any of those outside of the building.

BILL DUKE, being first duly sworn by the District Clerk to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Cofer:

Q. Your name is Bill Duke?

A. That's right.

Q. You are with KRLD in Dallas?

A. Yes.

Q. And tell me what equipment you have here?

A. We have an Auricon sound on film camera, 600-foot magazine; we have two Bell & Howell 70-DR silent cameras.

Q. Now, is that camera, the one with the 600-foot magazine, standing just inside the Bar next to the pool television camera?

A. Yes, it is.

Q. Close enough so that there is barely room for one gentleman with a hand camera to stand between the two [fol. 970] pieces of equipment as he is standing there now?

A. That's right.

Q. Then just immediately behind is a gentleman leaning on the Bar with a still camera and immediately to the left of it another moving camera; do you know who he is with?

A. We met briefly outside but I do not know.

Q. And your camera is the one the Court referred to earlier when he was discussing the number of cameras and the amount of equipment that would be permitted inside the Bar?

A. And during the recess, I talked to the Judge and he gave me special permission to leave my camera where it is now.

Q. Just inside the Bar and between the Bar and the jury box?

A. In its present location and in the same location as it was before the recess.

By the Court:

Let me make this explanation why. He informed me during the recess that he hooked up the cable where he can't extend it and get on the outside of the Bar and that is the [fol. 971] reason I granted him special permission to remain inside.

Mr. Cofer: That is all. Thank you, Mr. Duke.

We offer the photographs which we took with the Court's permission of this equipment and attach those to the Bill.

The Court: That will be all right.

Mr. Cofer: Most of them I believe were taken in the Court's presence except possibly one or two which were taken outside of the building of the van that has been the subject of certain testimony, the cruiser.

The Court: That will be all right and you may make that a part of your Bill.

Mr. Cofer: Those are the photographs made by R. L. Faulkner at our request.

Reporter's Note: These photographs were never handed to the Reporter to be marked as exhibits.

[fol. 972]

RENEWAL OF MOTION RE PHOTOGRAPHY AND
COURT'S RULING THEREON

Mr. Cofer: Now, I want to state again, briefly, the Motion which we have already stated to the Court and ask the Court's ruling on it again, but I believe it might be appropriate to state again very briefly now that the Defendant is present in court for the purpose of following procedure.

Our Motion is that the Court rule and order that the large cameras, that all of the cameras, and at least, the large cameras and the noisy cameras be removed from the court room and that the television cameras be removed from the court room, that the news reel cameras be removed from the court room and that the sound equipment be removed from the court room, and that the court room itself be reserved altogether for the purpose of determining the guilt or innocence of the Defendant. We make this Motion on the grounds that the presence of this equipment, the subject of our testimony that was offered on the Bill, constitutes a prejudicial influence upon the trial and deprives the Defendant of due process in several respects.

First, we say that the presence of all of the equipment that is here deprives the Defendant of due process in this [fol. 973] trial in that it deprives the Defendant of adequate representation by his attorneys. It deprives him of an opportunity to consult with his attorneys at the counsel table accurately; it deprives his attorneys of an opportunity to properly represent him in that it interferes with their handling of the case; it interferes with their conferences between each other; it interferes with their thought processes; it interferes with their interrogation of the witnesses and their comments to the Court and to the jury, because it is distracting and because it invades the privacy of the counsel table; and for that reason, we say that this basic constitutional right to representation that is adequate

and proper representation by counsel is being infringed upon by the presence of all of this equipment in the court room.

Now, second, and perhaps more important. We say that the cameras and sound equipment deprives the Defendant of due process in that they distract the jury and they will prevent the jury from rendering a fair decision and giving fair consideration during the course of the trial to the testimony of the witnesses and the evidence. The noise of the [fol. 974] cameras and the presence of the cameras towering above the heads of the participants and as close to the jury box as two or three feet, and the microphones that can be directed into the jury box and hear the jurors cough or whisper, or any movement, that those things will distract the jury and make it difficult for the jury to render a fair decision with respect to the matters submitted to them.

Further, the presence of this equipment will lead the jury to believe that something particular is expected of them with respect to this case and the fact that the jury will be aware that there are millions and millions of people all over the United States watching what these twelve people are doing will deprive the Defendant of an opportunity for a fair jury trial in this case.

Now, third, and most important perhaps is the danger to the proper presentation of the evidence. We say, Your Honor, that the Defendant will be deprived of a fair trial if this equipment is permitted to stay in the room because each witness will be put on the witness stand in front of four or five microphones, in front of a dozen cameras, some of which are directed to millions and millions of people [fol. 975] right now, live, that this is bound to have some distracting effect upon the witness, is likely to cause the witness to be confused in his answers and give inaccurate answers, or improper answers, or conceivably even untruthful answers. We say that the presence of this equipment will deprive the Defendant of a fair trial because of the effect on the witnesses, on the jury and on counsel, and we ask the Court's ruling upon this Motion.

The Court: Overrule the Motion in so far as it applies to the court room, with instructions that I have heretofore

given and are a part of the record. I will not repeat them at this time unless you deem it necessary that I repeat them.

Reporter's Note: Mr. Cofer nods to Court.

The Court: Mr. Cofer says it is not necessary that I repeat them.

Now, some complaints have been made that some of you working here are talking. I have not been able to hear you up here but do not talk among yourselves because that [fol. 976] would be disturbing just as badly as if the spectators out there were talking. It may be necessary later that I ask the noisy cameras to remove from the court room or be still. That may be necessary at a point; maybe not too far off, and I may have to do that.

As I said awhile ago, we are interested, first, in seeing that this case is properly tried and this has not been an invitation affair except for the jurors and the witnesses. I have not invited TV here; I have not invited newspaper reporters here or radio people, or photographers, but they have responsibility to the public and they are here, and the Court is going to be just as tolerant and as fair and understanding as he knows how with your problems, but at the same time, you must be understanding of mine. It may be necessary that some of the equipment later will have to be removed from the court room.

Mr. Hume Cofer: We want before the Court rules on our Motion, one observation about the jury. I did not mean to interrupt but want this in before the Court rules.

The Court: Do you want me to finish my ruling? [fol. 977] I have already ruled on the court room and I will finish my ruling.

Now, outside of the court room, I am sustaining the Defendant's Motion. There will not be any photographing or any pictures of any kind by any character of equipment on the second floor. That is this floor of the court house, or within the court room, except what you will do under my rules and regulations. That will be prohibited now on this floor.

This inside the Bar here is reserved for the lawyers and the Defendant. Of course, the jury over there in the box and I don't want that area disturbed. We have one table

over here to my left for as many of the press men as can be seated there. I don't want any one else over in this area while this trial is being conducted. That is our working area and we are not going to be disturbed in that area. Any time that I find out there is any equipment that is disturbing the jury or any one else, the Court will take the proper steps to eliminate it.

Did you have something else you wanted to say?

Mr. Hume Cofer: We want to add to our Motion the observation that the presence of this equipment is likely [fol. 978] to and probably will emphasize to the jury that the press of public opinion on the case and on the jury will lead the jury to lend, in its decision, a certain amount of weight or in some way at least to public opinion on the matter and lead the jury to base its opinion perhaps more upon popular appeal, popular prejudice than upon the evidence and instructions of this Court; and we add that to our Motion and we understand that the Court has overruled our Motion, as the Court has stated, to which action of the Court, the Defendant excepts.

The Court: Overruled in part and sustained in part.

Mr. Hume Cofer: With that as modified, we do take exceptions to the ruling of the Court as modified by the Court.

The Court: I do not feel—of course, if I did, I would sustain your Motion in its entirety, but because the trial may be televised to the outside public it would cause a juror to more—or less likely to find the Defendant guilty or not guilty. If I did, I certainly would sustain the Motion. I feel that we can select twelve men and women of [fol. 979] this County who will try the Defendant and decide his case on the law and evidence submitted in this court, and they will be qualified to do such; and I believe you can rely on the citizens of this County to live up to their oath.

That is all of the preliminaries before the trial.

Now, at the State's request, the first case to be called this morning will be State of Texas versus Billie Sol Estes, in Cause No. 16,818 on the Criminal Docket of this Court. What says the State?

[fol. 983] .

TUESDAY, SEPTEMBER 25, 1962, 9:00 AM

The Court: You gentlemen with cameras, I don't think you understood entirely my ruling yesterday on your activities. The Court does not want you at any time to come behind this Bar and take any pictures. This is reserved entirely for the Court, the lawyers and others that are necessary participants in this court proceeding.

When we recess or before convening in the morning or after five o'clock when court adjourns, these gentlemen many times want to sit here a few minutes and talk without being interfered with. So now I intended yesterday, and I want to make it clear this morning, that not at any time will you come on this side of the Bar and take any pictures. Mr. Bailiff here will see that that is enforced and any one who attempts to violate it, bring them before me.

Ladies and Gentlemen of the Jury, as the Clerk calls your names, answer out in a clear voice where we can hear you up here.

Reporter's Note: The jury is called, sworn and instructed to report back into Court at 1:30 P. M.

[fol. 983] Mr. Cofer: Mr. Pratt!

Recall of JIM PRATT for further interrogation.

By Mr. Cofer:

Q. Your name is Jim Pratt?

A. That is correct, sir. Jim is a nickname, but it will do.

Q. You are Operations Manager for the television operation of WFAA-TV?

A. That is correct.

Q. And you testified yesterday?

A. That is correct, yes, sir.

Q. On a Motion in this court room?

A. Yes, sir, that is true.

Q. You testified yesterday that your television cameras were taking and producing live TV show here in Tyler and in Dallas?

A. Yes, sir. That's true.

Q. And that was broadcast live here in Tyler yesterday during the day and in Dallas?

[fol. 989] A. Yes, sir; that is a fact.

Q. Then last night, you had out in your cruiser, that you referred to in your testimony, which is a large Greyhound bus van sort of thing beside the court house, you took that tape, did you not, and edited out the recesses and the delays during the day?

A. Yes, sir, that's true.

Q. And you spotted out KRLD?

A. Yes, sir, that's true.

Q. Then you took that tape as thus edited and what did you do with that?

A. We played it back last night at 10:40.

Q. How did you go about playing that back?

A. We took the edited tape back to the Station—

Q. Back to which station?

A. Back to WFAA-TV in Dallas and broadcast it there.

Q. Did you yourself take that tape to Dallas—

A. Yes, sir, that's true.

Q. —last night? About what time did you get to your Station?

A. About a quarter to ten.

Q. Then you put it on the air at 10:40?

[fol. 990] A. Correct.

Q. And then you and your crew came back here this morning to begin this hearing this morning?

A. I was the only one who came back this morning.

Q. And it was substituted from 10:40 to about 12:40 for a delayed show, was it not, on your Station—a late movie?

A. I believe that's correct. Sir, I went to bed early. I didn't see the program myself.

Q. But you do know that it was broadcast?

A. Yes, sir.

Q. With the usual interruptions for commercials during the broadcasting?

A. That is correct, yes, sir.

Q. Now, this morning, you have all of your equipment back and in place and operating?

A. Yes, sir.

Q. And what stations are broadcasting the product of your work this morning?

A. I have no way of knowing. I was here all day yesterday, and as far as I am concerned, my statement yesterday will have to hold. I didn't get to talk to any one about it at the Station. I got in quite late and got in here early [fol. 991] this morning.

Q. Is the Tyler Broadcasting Station broadcasting these proceedings this morning?

A. They were yesterday. I didn't check this morning. I assume they are, yes, sir.

Q. And WFAA is broadcasting it live this morning?

A. Yes, sir.

Q. This morning you were in the room when the jury was sworn in, were you not?

A. Yes, sir; I was called just prior to that.

Q. And when the jury was being sworn, there were a number of cameras turned on the jury?

A. Yes, sir.

Q. Was your camera on this side of the room, on my right and your left, one of the cameras that was being turned on the jury?

A. I am sorry, sir, I couldn't see. I was back in a corner.

Q. But you did notice a number of cameras that were being turned back towards the standing jurors who were taking the oath as jurors?

A. The film cameras, yes, sir.

Q. Last night when the broadcast was transmitted from 10:40, after 10:40 from WFAA in Dallas, that broadcast [fol. 992] was carried live by WFAA-TV and by the local Tyler television station?

A. That is my understanding, yes, sir.

Q. Do you know that there is a cable that serves Tyler television sets which enables Tyler television sets to pick up WFAA-TV?

A. Sir, I don't really know the technicalities of how the pictures are relayed here. It is either cable or microwave and I am not sure.

Q. But they do get it here?

A. Yes, sir, they do. You are referring to our pictures from Dallas?

Q. Referring to the transmission of last night of the replays of the proceedings of this trial.

A. On our Station?

Q. On WFAA-TV?

A. Yes, sir, that's true.

Q. And that was Tyler television sets could receive and did receive it?

A. From either ours or the Tyler station.

Q. From either WFAA-TV or from Tyler?

A. Or from KLTU in Tyler.

Mr. Oser: Pass the witness.

[fol. 993] Mr. McGowen: No questions.

[fol. 994]

[File endorsement omitted]

IN THE SEVENTH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

THE STATE OF TEXAS,

vs.

BILLIE SOL ESTES.

STATEMENT OF FACTS ON PRELIMINARY MOTIONS AND VOIR
DIRE OF THIRTY-TWO-MEMBER JURY LIST—October 22, 1962

[fol. 995] Be It Remembered: That heretofore, to-wit, on the 22nd day of October, 1962, there came on for trial the foregoing entitled and numbered cause, whereupon the following Preliminary Motions, Testimony on Change of Venue and Voir Dire of the 32-Panel Jury List were introduced, to-wit:

[fol. 996]

October 22, 1962

INSTRUCTIONS BY THE COURT

I want to make this statement about cameras in the court room. Any of you that have TV cameras, it will be necessary that you go back and get in the TV station back here for that purpose. Don't—there will not be any allowed anywhere else; so if you have any shots that you want to make, go back in the place for you back there.

Now, you who are with the Press, I want you to remain as stationary as possible. Don't be moving around any more than absolutely necessary where you will be in the disturbance of this court.

So all of you now who want to take TV cameras, go back behind there. You will not be allowed anywhere else. I want to point out that there will be no flash bulbs allowed; there will be no flood lights allowed, and there will not be any cameras allowed on this side of the Bar at any time. That means recess; that means after we adjourn or before court convenes in the mornings. These parties here, I don't [fol. 997] want them disturbed. They are here on serious business; and when we take a recess, many times they want to sit here and talk. So I don't want any cameras behind this Bar; I don't want any back in this ante-room, shooting from that angle and there will not be any cameras allowed on the second floor out of this court room at any time.

Now, those are the orders of the Court and any violation of them, you will be in contempt of court. I want to inform you now that I intend to strictly enforce them and I hope you understand what I mean. Now, any other shots from TV, you get behind there where you should be.

I am going to call the cases for announcement.

MOTION RENEWED TO BAN CAMERAS, ETC.

Mr. Hume Cofer: Your Honor, before the case is called, we have one preliminary matter that we want to mention to the Court.

We want to renew now our Motion that cameras and all sound equipment be removed from the court room, still cameras, movie cameras and television; and all radio facilities. We want to renew that Motion that those facilities

[fol. 998] be removed from the court and we want to offer some evidence in support of that Motion, on the renewal of that Motion, either now or at a time convenient to the Court.

The Court: We will take it up now so that we can get it behind us.

Offered on Motion by Defense Counsel

Mr. Hume Cofer: May I be sworn, Your Honor? (Oath is administered to witness by the Court).

HUME COFER, being by the Court sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

My name is Hume Cofer. I am one of the attorneys for the Defendant. I reside in Austin, Texas. I am an attorney, licensed to practice in Texas.

In connection with this Motion to exclude the cameras from the court room, I state to the Court that I can hear the cameras at the back of the room now and that the noise of the cameras is a distracting matter. I state to the Court that [fol. 999] the presence of the cameras and the clicking of the cameras and the grinding of the cameras in the back of the room constitutes a distraction and that it interferes with the handling of the case in the representation of the Defendant, in my opinion. I state to the Court that the presence of the cameras interferes to some extent, in my opinion, and our reaction to the handling of the case through our conferences with the Defendant in the court room and to our conferences with witnesses and the other attorneys, and with The Court in the court room.

Is there anything else, Dad?

Mr. John D. Cofer: And the fact that the witnesses face the cameras and the jury will face the cameras.

Mr. Hume Cofer: I notice as I sit here in the witness box that a witness from this position faces four large cameras at the back of the room and three microphones here in the room; and I notice that the—from the position of the jury box on the right, the jurors face off to the right of the jury [fol. 1000] box, the booth which has been constructed since the last hearing for the cameras in the back of the room.

Examination.

By Mr. McGowen:

Q. Do you hear any cameras clicking right now?

A. I do not hear any clicks; I do hear a grinding or humming noise.

Q. Now?

A. Yes, sir, I do.

Q. Right this minute?

A. Right this minute.

The Court: That is the air conditioning now.

Witness: Well, it wasn't present at the September hearing when the weather was much warmer, I believe, Mr. McGowen; the noise which I hear now, I did not hear then.

Mr. McGowen:

Q. Do you see any cords on the floor?

A. No.

Q. Is there any difference today than it was the last time we were here, with respect to locations of any of these [fol. 1001] offensive cameras?

A. Yes, I should say so. The publicity that was given this trial on the last occasion and the number of cameras here, I think was sufficient to spread the news of this case throughout the county, to every available juror; and it is my opinion that on that occasion, there were so many cameras and so much paraphernalia here that it gave an opportunity for every prospective juror in Smith County to know about this case.

Q. Not about the facts of the case?

A. No, sir; not about the facts, nor any of the evidence.

Q. Now, I would like to ask you, Mr. Cofer, about the physical arrangement now as opposed to then—of the cameras I am talking about?

A. Yes, sir.

Q. Would you say that the cameras are located in the rear of the court room behind a panelled screen?

A. They are behind a panel structure and through an opening in the structure.

Mr. McGowen: No further questions.

[fol. 1002] JOHN D. COFER, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

My name is John Cofer. I am, at least, senior in years, of the attorneys who are representing the Defendant in this case. I practice law in Texas—now forty-one years. I have a law degree; I am a licensed lawyer to practice in Texas, in the Supreme Court of the United States, in the Fifth Circuit, and in all of the Federal District Courts Divisions in Texas. I am a member of the American Bar Association and have been a member of the American Bar Association for—in excess of thirty years, I believe. All members of my firm are members of the American Bar Association.

Mr. McGowen: Your Honor, the State will stipulate that Mr. Cofer is a qualified trial lawyer.

Mr. Cofer: The matters I am going to talk about, Your Honor, have nothing to do with my qualifications. The matter [fol. 1003] of my qualifications is a matter for my client alone and not Mr. McGowen.

To me, it is highly distasteful to be forced to defend a man in a criminal case where cameras are trained on me during the trial or any part of the trial. I believe sincerely in Canon 35 of the American Bar Association which prohibits photography or cameras in the court room.

At the previous hearing in this case and since that time, I have given very serious consideration to asking the Court to relieve me from the necessity and duty of defending the Defendant in this court room in this case. I have consulted, with reference to that, with my client, my associates and with other attorneys, since it was a personal matter; and I have reached the conclusion that to make such a request not only would be—result possibly in delaying the trial of this case but that it would have the effect of featuring this trial upon me personally and might be construed as an effort to obtain some personal vindication and publicity in the [fol. 1004] trial. So, I have come to the conclusion that I am not justified in going to that extreme and so embarrassing this Court by refusing as an attorney to participate in something that violates my code of ethics very much.

To me, it is so highly improper for a lawyer, The Court, or any judicial proceedings to proceed under this character

of publicity. I have a feeling that the First Amendment. I believe it is, of the Constitution of the United States, which guarantees a man a public trial is for the benefit of the Defendant and that nobody else has any rights thereunder or has any interest in this trial. There are just two people, the State of Texas and the Defendant, that have interests and officers whose duty it is to administer and see that justice is performed. So far as educating the public or informing the public of what is going on here, I think that that is wrong. I think this trial should be conducted between the State of Texas and the Defendant with the permission of those who can and are interested to come to this court room without any unusual method of spreading this [fol. 1005] case out to the public.

This situation that I am put in seriously interferes with me in rendering my best services to my client. The fact that it outrages my personal ethics, colors my feelings and makes it difficult for me to—to the extent that I feel I should, wisely pass upon the rights of the Defendant in this case. I do not think that I should be required to undergo a trial of this kind, of this publicity.

Mr. McGowen asked a little bit about the change in the manner in which the cameras are presently in the court room over the last time. I would say it has been substantially cleaned up. The noise has not been reduced. Though I am not particularly sharp of hearing, I can hear whenever the news cameras are grinding, I can hear the grinding. It distracts me, but most of all, as I sit here in the witness stand, this court room doesn't look like a court room to me; it looks like a moving picture theater. I see in the back of the court room what seems to be permanent construction because the wood is blended with the panelling of the court [fol. 1006] room, and it looks like a theater and this trial has assumed to me a character of proceedings to entertain and instruct the public rather than determine the guilt or innocence of the accused. The cameras, one, two, three, four, five—I see in the booth now, shine out of the booth just as cameras do at a moving picture show proceedings in a theater. It is like the defendants of Perry Mason's. The trial of Mary Duggan who was put on in my youth as a play, and I think that is wrong, and, in addition to that,

these mikes—I don't know where they go but in so far as the privacy of the testimony of the prospective jurors and the witnesses is concerned if these microphones picked up what they say, it will go out to the public and will eventually get to the witnesses and other jurors and enable them to form their answers. It impresses the jury that this is an unusual case in which the public who is listening and watching is expecting them to do some particular thing.

I know that it will interfere with my argument in this case. I have read in the press that the Court is going to [fol. 1007] permit the taking of pictures during the argument, and I shall ask specifically with reference to my argument and that of my associates who argue that their pictures not be taken while the arguments are proceeding.

Having stated my position and one that I believe in very firmly, I will say that I have never consented, voluntarily, to any pictures in the court room during the long years of my practice, and, in only one case were pictures taken, and I always regretted that. I was overruled by my client, who was seeking publicity, and I think the publicity that he got was one of the large elements that resulted in his conviction and him being one of the few men that I have defended who served any time in the penitentiary.

I believe that is all.

Mr. McGowen: No questions.

↑
MARSHALL PENGRA, witness called in support of Motion being first duly sworn to tell the truth, the whole truth and [fol. 1008] nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. Marshall Pengra.

Q. What is your occupation?

A. I am General Manager of KLTV, the local television station.

Q. Tell us what facilities of your local television station are in the court room this morning.

A. We have one electronic sound on camera that is in the aperture at the back.

Q. The electronic sound on camera is a piece of equipment which takes film and sound; is that correct?

A. Yes.

Q. Is it broadcasting now or is it reducing the proceedings to a picture which can be broadcast later?

A. That is what it is doing. It is reducing the proceedings presently on film with sound.

Q. With sound?

A. With sound.

Q. And so that that moving picture and that sound can [fol. 1009] be transmitted by your station at a subsequent time?

A. That is correct.

Q. Do you know whether any television facility is broadcasting now live?

A. To the best of my knowledge, no, there is no television facility that is broadcasting from this court room where it is then being telecast live and simultaneously; no.

Q. Do you know whether any radio station is doing that?

A. No, I don't have that information.

Q. Does your station have a radio transmitter?

A. No.

Q. You are only television?

A. Right.

Q. What other cameras are located in the back of the room in the structure which has been built there, Mr. Pengra?

A. Under the Judge's ruling, it was provided that the three television networks to be allowed representation with sound on film cameras at this point in the proceedings, and as I understand it, the three networks affiliates from Dallas [fol. 1010] are present and using the same type facilities that we are, in the terms of film and sound.

Q. Will the film and sound which you are taking be available for any other station—any other television station?

A. You mean for our particular camera?

Q. Yes, sir.

A. No. However, the film that is being taken by the representatives of the network is to be available on a pooled basis from Dallas.

Q. How many of those cameras are there representing the networks?

A. Three.

Q. And that will be—those films will be available on a pooled basis to all of the stations of each of those networks?

A. Well, technically, they would be on a pooled release to any station which shows an interest would be able to contact one of the three stations in Dallas to make its own arrangement.

Q. What networks are those that are—that have facilities in back of the room there now?

A. ABC, NBC and CBS.

Q. And they have, as you suggested, film and sound, each [fol. 1011] of those does?

A. Yes.

Q. And your station has a fourth camera which has film and sound?

A. This is under the arrangement as provided by the Judge's ruling, that three networks would be allowed facilities and the local station would be allowed facilities.

Q. Are you familiar—you have mentioned a couple of times the Court's ruling on this matter—I believe that was made by way of a statement to the news media, was it not?

A. I understood it to be a combination of ruling and statement, yes.

Q. Tell me whether or not, according to your recollection of that statement, this paragraph was included in it, beginning at the point I am indicating here and going down through here?

A. Will you state your question again?

Q. Do you recall that that paragraph was a part of the Court's statement and decision on this problem of cameras?

A. No, I don't recall that that was part of that particular statement because there have been several statements.

[fol. 1012] Mr. McGowen: Your Honor, with respect to the Court's ruling in this matter, I think it would be more expeditious if Mr. Cofer asked the Court what the Court's ruling was.

Mr. Cofer: We will just state to the Court and it may be stipulated as you suggest, Mr. McGowen, that a copy of the news release that we saw states "If the Judicial Section of the State Bar of Texas meeting in Austin on October 5th and 6th, does not adopt Rule 35 of the Canon of Ethics, of the American Bar Association, and continues to permit each Judge to conduct his court and control his court room as he deems right and proper, as long as the law is complied with, in that event each television network and the local television station will be allowed one film camera without sound in the court room and the film will be made available to other television stations on a pool basis"; and what we are trying to do is to offer in evidence that portion of the statement.

[fol. 1013] Mr. McGowen: We object to the introduction of anything. I don't know whether this is the Court's statement or not. Let me look at it. (Counsel is shown instrument). We have no objection to Your Honor's ruling being put in evidence but that is evidently a mimeographed copy or something from a newspaper.

The Court: I will be glad to furnish you with a copy of my statement later and you can put it in the record in full.

Mr. Hume Cofer: That will be fine, Your Honor, and that will be more accurate. The thermofax is marked "D-1" and we will substitute that, if we may.

The Court: That will be all right.

Mr. Cofer:

Q. Mr. Pengra, do you know who constructed the structure in back of the court room?

A. Before I answer that, may I make a comment regarding this matter that you have just raised?

Q. Is it concerning the question that I asked you about [fol. 1014] that paragraph, Mr. Pengra?

A. It is concerning the wording and the fact that there were a number of releases as far as news was concerned, and it involved the rule 644 of the Texas Code of Criminal Procedure.

Q. I believe we will not need that now, thank you, sir. I do want to ask you about that structure at the back of the room; who built that? Do you know?

A. Yes. Members of my staff constructed that.

Q. Of the Tyler Television Station?

A. Correct.

Q. And by whose authority and with whose permission?

A. Under the direction of the Judge as to what area to be serviced, the type of structure to be handled.

Q. So that it is fair to say that the structure in the back of the court room was put there and constructed and built there by the Tyler Television Station with the authority and permission of the District Judge who is presiding in this case?

A. We talked at considerable length with the Superintendent of the building; we conferred with Judge Dunagan in this matter; we made complete revelation of plans as far as structure was concerned and submitted it to them and solicited their approval.

Q. Did they give that approval?

A. They did.

Q. The building superintendent and Judge Dunagan?

A. Yes, sir.

Q. In order to put that structure back there, was it necessary to remove any of the permanent seats in the court room?

A. No.

Q. Was the back pew removed or just moved forward?

A. There were two benches that were immediately at the left rear of the court room as I face it. One was moved in the front on this side and the other was moved in the front on the right hand side and the total seating capacity of the court room as furnished by permanent bench structure has not been changed at all.

Q. So those two benches were moved up next to the Bar?

A. Correct.

[fol. 1016] Q: During the September hearing, Mr. Pengra, it is true, is it not, that your station—is it KLTV?

A. Correct.

Q. KLTV transmitted from the court room the proceedings live and simultaneously?

A. That's true.

Q. At breaks in the proceedings and at intermissions or pauses in the proceedings, state whether or not your station

would interrupt the transmission of the court room proceedings to insert commercials?

A. Yes. At certain breaks in the proceedings where the actual activity was just—in the court room had been suspended, we instituted there a practice of inserting those commercials which normally occupied that time period within our regular daily operations.

Q. And, of course, you charged the companies or people who purchased those commercials you normally charged for that time?

A. Yes, we did.

Q. And that was a profit enterprise of your station, those commercials?

[fol. 1017] A. Those commercials that are carried on our station are aimed to be a profit enterprise.

Q. Then the purpose in transmitting it—in transmitting the proceedings here is not for the education and instruction of the public?

A. I would say that was your interpretation and mine would be exactly the opposite.

Q. Now, on the occasion of the September hearing, during the evening, Monday evening, September the 23rd, I believe it was, wasn't it, your station played through again substantially the entire proceedings?

A. I can't recall the exact number of minutes that we devoted to the play-back of the tape, a portion of the tape that was taken during the day; and whether you could say substantially, I would have to get that information and find out exactly the number of minutes that were carried. It was a lesser version than the live.

Q. I would like to ask you this: where did you obtain—what was the source of that evening transmission on September 23rd?

A. That transmission originated with WFAA in Dallas. [fol. 1018] Q. If you transmit—did you transmit on that evening everything that WFAA transmitted—that is September 24th we are talking about; that Monday, September 24th, on that evening, did KLTV transmit everything that WFAA—everything of the court proceedings that WFAA transmitted?

A. Yes, we did.

Q. Now, you substituted that transmission on that evening, did you not, for your late picture show?

A. We do not carry a late picture show. In this particular case, it was substituted for a program known as the "Tonight Show".

Q. Tell me whether or not during the evening of the proceedings—that were being broadcast, you interrupted the broadcast from time to time to insert and transmit commercials?

A. We did not interrupt the broadcast, as you state, Mr. Cofer. At places where there would be a cessation in the proceedings and where there would be normally a pause, there were insertions of some commercial material of that [fol. 1019] which usually appear during that time in our schedule.

Q. Now, this film that you are making today, that your station is making and that three other stations are making, will be used, will it not, in the same manner; that is, it will be used by the stations which acquire and transmit it in between commercials and around commercials?

A. No, I don't believe that is the way it will be used. I think that on our station, it will become a part of the film clips—what we call film clips in our news and it will be handled under our standard format of our news presentations. As far as our station is concerned, this is not a filming of a sequence to be carried. It is our intention to use this as film clips within our news.

Q. This film—those films when will they be ready, these that are being taken now, when can they be transmitted?

A. The ones we are taking now, barring any kind of an accident, as far as our pickup is concerned, will be available on the six o'clock news this evening.

[fol. 1020] Q. And will probably, at least, parts of it will probably be transmitted during—here in Tyler on the six o'clock news this evening?

A. Yes.

Q. And will be available to be used by witnesses and jurors who may be watching television at the same time?

A. Certainly, if they are here and viewing.

Q. Witnesses and jurors in this case who might be watching will have an opportunity to view it this evening?

A. If they can look at a television set, they could certainly see it.

Q. Tell me where the microphones are that pick up the sound that are being used by the television facilities.

A. It is my understanding, there is one microphone there (indicating)—

Q. On the Judge's Bench?

A. Yes; and two of those, as I understand, on the Judge's Bench are part of the court equipment, as you can see the lines coming down here to the soundscreeber and over here on this side. So, there is one microphone which is servicing [fol. 1021] all of the cameras at the back of the room, from there; and I believe, but I am not sure, but I think this is one.

Q. The black one in front of the witness box?

A. Yes.

Q. It is your impression, then, that all four of the television facilities are using the same two microphones here on the witness box and on the Court's Bench?

A. That is my belief, and I think it ought to be checked, however, because I am not sure exactly of what the mechanical arrangements are.

Mr. Cofer: Pass the witness.

Mr. John Cofer: Could we find out if the State is opposing television or in favor of it? What is the position of the State?

Mr. Maloney: It is within the discretion of the Court.

Mr. Cofer: Then you are not joining in on opposing it?

Mr. McGowen: We are not joining in any of your Motions, Mr. Cofer.

The Court: Let's proceed with this Motion, Gentlemen, and move on. I want to get through with it.

Mr. Hume Cofer: I have no further questions for Mr. Pengra.

Mr. Maloney: Your Honor, we would ask the Court if it is possible while this witness is on the stand to have a picture made of this area? I am sure counsel would like to have it for their Bill and we have no objections to pictures being made under the directions of the Court.

The Court: I have granted the Defendant the right before to make pictures of the set-up and the State will have

the same right. If you have any one you want to take those pictures now, you may have him come forward.

Reporter's Note: A number of pictures are being taken from different views in the court room by Ferd Kaufman with AP and Jerry McNeill with UPI.

Recall of Marshall Pengra for Further Questions.

[fol. 1023]

By the Court:

Q. Mr. Cofer asked you a few moments ago about who built the stand back there for TV and I believe you said that you built it, or your station built it?

A. Staff members was my understanding.

Q. Was it built entirely at your expense?

A. Yes, sir.

Q. And the tax payers of this County have not been out a penny on it?

A. That is correct.

By the Court: That is what I want to know.

Witness: Could I ask a question?

The Court: That will be all right.

Witness: On the original Motion wherein you requested that the cameras are to be kept out of the court room, did that include newspapers' cameras as well? Is this all cameras?

Mr. Hume Cofer: Our Motion applies to all cameras, still [fol. 1024] and movie.

The Court: It includes all of them.

FERD KAUFMAN, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination:

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. Ferd Kaufman.

Q. What is your occupation?

A. I am photographer for the Associated Press in Dallas.

Q. How long have you been with the Associated Press?

A. Five and one-half years.

Q. You are here now covering this trial?

A. Yes.

Q. What equipment do you have?

A. I have two cameras, 35mm type, as you see.

Q. One has a long lens on it and what is the purpose of that lens?

A. It is a telephoto lens, Mr. Cofer, which allows bigger images from further distance.

[fol. 1025] Q. A moment ago the State requested and the Court admitted the taking of pictures of the structure in the back of the court room and you volunteered to take those and you have done so.

A. Yes.

Q. You will have those pictures available for the use of the State in showing the set-up in the back of the court room?

A. Yes, sir; and I also assume we will use them, if we so desire.

Q. That then will be available to the Associated Press?

A. That's right.

Q. How many people are here with Associated Press?

A. Present in the court room, there is myself and a reporter.

Mr. Hume Cofer: Pass the witness.

Examination.

By Mr. McGowen:

Q. I would like to ask you, Mr. Kaufman, did you take one of those pictures from the jury box?

A. Yes, sir; I took it from that second step back there.

[fol. 1026] Q. Which would be the view that the jury sitting in the jury box would have of the structure in the rear?

A. Yes, sir.

Q. Did you take one from the witness stand?

A. Took one from behind the witness stand.

Q. Which would represent the view the witness would have of the structure in the back?

A. Yes, sir.

Q. Did you take one from the Judge's Bench?

A. Yes, sir.

Q. Which is the view the Judge would have from the structure?

A. Yes, sir.

Examination.

By Mr. Hume Cofer:

Q. First, as you look at me and my co-counsel, if you look directly over our heads, the line of vision is directed towards those cameras, is it not?

A. I can see them, Mr. Cofer.

Q. It is in a straight line behind me?

A. That's right.

Q. Now, if you were seated in the jury box and you were looking at those cameras, it would not be possible for [fol. 1027] you to see the witness, would it?

A. I don't know, Mr. Cofer. I haven't sat down in the jury box.

Q. You took pictures from over there, didn't you?

A. What I see through this camera would certainly not be exactly what the eye is going to see.

Q. Isn't it fair to say that if you are in the jury box under tension and your vision were attracted to the structure at the back of the room, that you would not be looking at the witness? I am just trying to show the physical layout. The cameras are in such place where a juror couldn't see the cameras and the witness at the same time; isn't that a correct statement?

A. No, sir, I don't think it is a fair statement.

Mr. Hume Cofer: That is all.

Mr. McGowen: No further questions.

By the Court:

The cameras are facing east and the jurors would be facing south; and if they look to the west, I would think [fol. 1028] they would have to turn their heads to the right to do so.

JERRY A. McNEILL, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. Jerry A. McNeill.

Q. Mr. McNeill, what is your occupation?

A. I am a news photographer with United Press International in Dallas, Texas.

Q. How long have you been with United Press International?

A. Nine years, next month.

Q. How many people are here from UPI?

A. At the present time, there are—just myself, I believe. The Reporter has just left the room.

Q. You do have a reporter here?

A. There is a reporter here, yes, sir.

Q. When the gentleman from the Associated Press volunteered to take the pictures of the structure in the back of the room, state whether or not you stepped up to the Bench [fol. 1029] and requested an opportunity to take pictures from the same angle of the same things.

A. I requested permission of the Judge for equal privileges.

Q. And did he grant that permission?

A. Yes, sir. I asked for either an order of the Court that those pictures not be used by the news media or that I be given equal opportunity and left it to the discretion of the Court.

Q. And he granted you permission to take the pictures?

A. He granted me permission to take the same pictures.

Q. And you did that?

A. Yes, sir.

Examination.

By Mr. McGowen:

Q. Did you take them from the same place that Mr. Kaufman took them?

A. As nearly as I could, yes, sir.

Q. From the Judge's Bench, jury box and witness stand?

A. Yes, sir.

Mr. McGowen: Thank you. No further questions.

[fol. 1030] MIKE SHAPIRO, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Your name is Mike Shapiro?

A. Yes, sir.

Q. You live in Dallas, Texas?

A. Yes, sir.

Q. How long have you lived there, Mr. Shapiro?

A. About four years.

Q. What do you do in Dallas, Mr. Shapiro?

A. I am General Manager of WFAA Radio and Television.

Q. You are general manager of the entire facility of radio and television?

A. That is correct.

Q. At the September hearing of this case, Mr. Shapiro, the evidence shows that WFAA had considerable equipment here in the form of a mobile unit and three cameras: you, of course, were familiar with that operation?

A. Yes, sir.

And in that connection, Your Honor, I wonder if it might not shorten the proceedings here, if the Court will give [fol. 1031] us permission to offer the transcript of the proceedings on September 24th and 25th, concerning this trial?

The Court: Just offer the tapes, you mean?

Mr. Hume Cofer: No—well, I do want that in a minute, but offer the Court Reporter's transcript of the proceedings on that occasion so that that evidence will be back in. The Court will remember that on that occasion, we had present the Operations Manager from WFAA-TV and a couple of other people, and we would like to offer that same testimony again on this renewal of our Motion.

The Court: The only thing the facts then are not the same as the facts here now.

Mr. McGowen: Your Honor, we have an entirely different situation now.

The Court: A different situation from what that record shows.

[fol. 1032]

OFFERS IN EVIDENCE

Mr. Hume Cofer: I think the record should show that, Your Honor, and the way I offer it, I offer that as a transcript of the proceedings on that date, so that it will show what the testimony was on that date, and what the situation was on that date. I don't mean to suggest that the facts as testified to then is applicable now.

The Court: You are not offering it as the situation of today?

Mr. Hume Cofer: That is correct.

The Court: All right. You may offer it as the situation of September 24th and 25th.

Mr. Hume Cofer: That has been transcribed and we do offer it and will make it available to the Court.

Reporter's Note: This original transcript or Statement of Facts of the proceedings had on September 24th and 25th is being attached and made a part of this Statement of Facts.

[fol. 1033] Mr. Hume Cofer:

Q. Now, I believe it is, true, Mr. Shapiro, that the mobile unit and your live television cameras have not been brought back here to the court room?

A. That is correct.

Q. What facilities here in the court room are available to WFAA-TV?

A. One camera positioned in the camera booth built for this trial that belongs to ABC and we have been delegated by the ABC Television network to cover for them and that is the camera we will use for our own use.

Q. Is that your camera or is that ABC's camera?

A. It is our camera.

Q. So that you are really performing this function for ABC?

A. That is correct, and for ourselves.

Q. And for yourselves?

A. Yes, sir.

Q. And the product of that work will be available to all of the stations of the ABC network?

A. That is correct.

Q. And that camera, as Mr. Pengra has said, has sound [fol. 1034] equipment with it?

A. That is right.

Q. Have you been served with a subpoena in this case?

A. I have.

Q. Did that subpoena call upon you to bring with you certain video tape which were from the preceding hearings in this court in September?

A. That is correct.

Q. Do you have that tape with you?

A. I do.

Q. Where is it—over there in that chair?

A. In that chair.

Mr. McGowen: The State is going to object to the introduction of any film until we see it and make sure it is all of it.

The Court: Overrule. You can interrogate him and find out on that.

Mr. Hume Cofer:

Q. Tell us what you have—what video tape you have, Mr. Shapiro.

A. The video tape represented here is the unedited [fol. 1035] version of what we televised on September 24th and September 25th.

Q. What do you have—three boxes?

A. Three rolls of video tape.

Q. Three rolls of video tape. Now, this video tape is not a transparent tape that shows pictures by light process?

A. No. It is a special video tape and you have to have a tape machine to look at it.

Q. And that tape machine takes electronic or magnetic impulses off the tape and makes it into a picture; is that correct?

A. Yes, sir.

Q. And this is video tape which can only be shown with that special machine?

A. That is correct.

Q. It is your sworn testimony that those three reels that you have there are the product of what your cameras did in the court room on September 24th and 25th?

A. That is correct.

Q. And it has not been edited. These rolls have not been edited?

A. They have not been, no, sir.

[fol. 1036] Q. Now, you did edit it and make another copy with certain omissions, did you not?

A. That is correct.

Q. Was that tape, edited in this fashion—the one which was transmitted on Monday evening, September 24th?

A. That is correct.

Q. You have that tape but you have not brought it with you?

A. Right.

Q. State whether or not on that occasion, substantially all of the proceedings were transmitted—were the omissions trivial or substantial?

A. The omissions were the lapses in the trial, calling the witness' names, and we had some technical trouble at the beginning of the trial.

Q. Relatively insignificant omissions?

A. Correct. The tape run on Monday night the 24th were the high lights of the trial.

Q. And it lasted how long, do you remember?

A. I jotted some notes down; in fact, I have a log here which I cannot give you. They belong to the station FCC, as well as the tape, but the figures I have, Mr. Cofer, on [fol. 1037] the 24th day of September, we began our live coverage at 9:55 A. M. and we returned to regular program at 11:50 A. M. We came back for live coverage at 1:30 P. M., back to our regular program three minutes later, 1:33. We came back to live coverage at 3:00 o'clock that afternoon, Monday, the 24th, returned to our regular program eighteen minutes later, 3:18. That was the total amount of time live televised by our station and also by KLTW. The video tape ran from 10:43 P. M. that night to 12:21 P. M.

Q. On that night, September 24th?

A. That is right. Total time for the trial, live, on September 24th, two hours and sixteen minutes; total time for the night time program was one hour and thirty-eight minutes; so actually, we covered on Monday, September 24, a total of three hours and fifty-four minutes devoted to the trial, either live or video tape.

Q. That has been run once since then by the station, the Tyler station, has it not?

A. Which?

[fol. 1038] Q. One of those tapes, either the edited or completed edition?

A. They carried it the same time we did.

Q. I understand that; they carried it live that day and that evening?

A. Yes.

Q. And then once a couple of weeks ago?

A. I have no knowledge of that whatsoever.

Q. You mentioned that your log of your time, which I want to talk about some more, and the tape in your custody and must be kept in your custody under FCC rules—

A. Yes, sir.

Mr. Hume Cofer: Your Honor, we request that the Court Reporter mark these three boxes and these three spools.

Mr. Shapiro can't give them, not permitted to and we ask whether it cannot be agreed and understood that we may mark them, identify them, and leave them in his custody. Mr. Shapiro, if we do that, will you keep them safely at WFAA-TV and keep them available for the uses of the State and the Defendant in any connection that is appropriate [fol. 1039] in connection with this proceeding?

A. Yes, sir; but I will state at this point that we want to show no partiality. It is available to the Court.

By Mr. Hume Cofer:

Q. To the Court or to either party to this proceeding?

A. Correct.

Mr. Cofer: And we do make that request. In other words, we think the Court ought not to require Mr. Shapiro to leave them.

The Court: All right.

Mr. Hume Cofer: We do offer Defendant's Exhibits 2, 3 and 4 on this Motion.

Reporter's Note: These tapes and spools identified as Defendant's Exhibits 2, 3 and 4, but not released to the Reporter.

Mr. McGowan: The State would like to ask Mr. Shapiro one question in regard to these exhibits.

[fol. 1040] Q. This is the total film that you have with respect to the proceedings?

A. Yes, sir. This covers everything for the two days, September 24th and 25th.

Q. And only portions of that were actually televised?

A. Right.

Q. All that is here was not televised; is that correct?

A. Yes, sir. Everything here was televised. We taped it while we were televising it live, so it was unedited and everything went on the air for those two days.

Examination.

By Mr. Hume Cofer:

Q. This is what went on the air during those two days, as taped as it was going on the air?

A. Yes, sir.

Q. The only editing that was done was before you replayed it on the evening of the 24th?

A. Correct.

Q. Did you play any more back on the evening of the 25th?

A. No, sir.

Q. So that on the 25th, the only transmission was the [fol. 1041] live transmission?

A. We did have news coverage on the 25th, but it appeared in our regular news cast, no special program.

Q. Did your news coverage have spots from this tape?

A. From the Tuesday tape, yes, sir.

Q. Beginning on Monday morning, at the beginning of and during and at the end of the live transmission from the court room, what commercials did WFAA put on the air with the tape?

A. Mr. Cofer, at the outset, I would like to repeat what Mr. Pengra testified to a minute ago. These are commercials that were sold our stations between and participating in the regular programs; so there was no attempt to go out and sell commercials for this. These are regular commercials appearing in our regular program.

Q. In other words, it is your testimony that you did not say to any customer "I have a particularly good spot for you in connection with the Estes proceedings"?

A. To be quite honest with you, I don't think they know [fol. 1042] today they were in the trial, that the commercials were in the trial.

Q. But you did play and transmit at the time of the proceedings those commercials which you are about to tell us of?

A. That is correct. And that was when they were in recess, at an appropriate time within the actual trial pro-

ceedings itself. We went on the air at 9:55; at 10:30 A. M. we ran a one-minute commercial for Sprite.

Q. For whom?

A. Sprite.

Q. That is a soft drink, I believe?

A. That's right.

Q. Is it a singing commercial?

A. I don't know.

Q. Aren't most of the Sprite ads singing commercials?

A. They may be.

Q. You know considerable about your sales, don't you, Mike?

A. You want to keep on this one or go to the next one?

Q. I want to know what you know about the Sprite [fol. 1043] commercial, and if you don't know that is all right.

A. I am sure there is some music in the commercial. The next commercial was run at 11:42 for Shedd Bartusch. The next commercial which was run for a minute was at 11:43 for Campbell's soup.

Q. Any others during the morning's proceedings?

A. No other from 9:55 to 11:50 and none between 1:30 and 1:33; and none between 3:00 and 3:18.

Q. Now, during those times, how many station breaks would you estimate you had, or can you tell from your log?

A. I can tell from the log.

Q. Tell us how many station breaks during that entire time.

A. There was a station break at 11:42 to identify the station.

Q. Is that the first one since 9:50?

A. Yes, sir. There was another one—

Q. Wait a minute. Did you go from 9:50 to 11:42 without a station break?

A. From 9:50—that is correct.

Q. Didn't you have a station break in connection with [fol. 1044] those two or three commercials that you mentioned?

A. This is where the station breaks appear. I just gave you the time period next to the Shedd Bartusch Market.

Q. And there was not one before that?

A. No, sir. The next one came at 11:42, next one Campbell's soup commercial; next one came at—that was all during the trial, those two.

Q. And one just before the beginning of the trial proceedings and one at the end of the trial proceedings?

A. Yes, sir.

Q. When you take the station breaks like that, does your affiliate station ordinarily show its own station identification and a short commercial of its own?

A. In some cases, but we did not on this day. Purely identifying the stations and no commercial messages adjoining it.

Q. Did the commercials which you have mentioned go out over the wire to Tyler?

A. I don't know. I couldn't answer that.

Q. You don't know whether Tyler played your commercial [fol. 1045] or its own?

A. I have no knowledge of that.

Q. Now, if you will, tell us about the commercials at the beginning of, during and at the end of the program on Monday evening, September 24th.

A. We had a station identification at 10:42 P. M. that night, Monday, the 24th.

Q. What time did the program start?

A. Started on the air at 10:43. We identified the station just prior to the beginning of the tape.

Q. And there was, was there not, a commercial just prior to the beginning of the station break?

A. Yes, there was.

Q. Do you know what it was?

A. Yes, I do.

Q. What was it?

A. There were two commercials, one for Simonize and one for Been Eye Drops.

Q. But the Simonize and Been's Eye Drops preceded the station break which preceded the handling of the trial?

A. Yes, sir. I would like to say at this point, Mr. Cofer: you are trying to read this log into the trial itself, when [fol. 1046] these commercials are scheduled every night in that sequence. The fact that they happened to be adjacent

to the trial, I don't think should be a part of the commercials listed for the trial.

Q. I understand that they are not on the same tape, but I do want to ask you, and I don't think you have any objections, what came immediately before the play and during and immediately after that evening.

A. I have already given you the announcement preceding the beginning of the tape at 10:43.

Q. Then what is next?

A. The first commercial that was run inside of the tape came at 10:48, Icecapades, and at 10:49 a commercial for Rayco seat covers.

Q. Now that Icecapades and that Rayco seat covers they were played one after the other without any court proceedings between; is that correct?

A. That is correct, in order not to interfere with any trial tape activity. In other words, it was placed in the tape in the same manner that we would place it in a movie or anything else.

Q. And, as a matter of fact, the court proceedings that evening were substituted on your station for your late [fol. 1047] show, were they not?

A. Correct.

Q. For the late movie?

A. That is correct, and the commercials that you are hearing about now would have normally gone in that late program.

Q. You just played the same commercials that had been scheduled for the late movie at the same places during the transmission of this program?

A. That is correct. We had a total of six breaks in the tape.

Q. Six breaks in the tape, not counting the ones we talked about just before or after the end?

A. That is correct.

Q. And at the first break that you have just told us about, you had Icecapades and Simonize?

A. Icecapades and Rayco seat covers.

Q. How long did each of those commercials last?

A. A minute.

Q. A minute for each?

A. Yes, sir.

Q. What was your next break?

A. The next one came at 11:13, minute announcement for Home Furniture and a minute announcement for [fol. 1048] Interstate Theater.

Q. Just those two, one minute commercials?

A. That is correct. The third break came at 11:41 All detergent for a minute, and Griffin polish for twenty seconds.

Q. All right, sir; go ahead.

A. At 11:42 we identified again—this was a tape presentation from the trial; at 11:53 the fourth break came up for Guest Beard for a minute and twenty-second announcement for Murine. The fifth break came at 12:08 for Skyline—and an eight-second announcement for Readers Digest. The last break came at 12:14 for a minute for Dallas Morning News.

Q. Anything besides the Dallas Morning News on that?

A. No; just one on the last one.

Q. During each of those breaks, state whether or not you also identified your station?

A. No, sir. We didn't identify it but once.

Q. You did not have any slides?

A. We had a slide on at 11:42.

Q. That shows the station?

A. That's right.

[fol. 1049] Q. And not again until after the proceedings?

A. That's right.

Q. What did you have on while you were explaining on the occasion of that break, the nature of the program, what did you have on the screen? You mentioned one break there when you told what you were doing.

A. I believe it was a standard station slide; special event, not positive.

Q. Was that the only station slide you showed from the beginning to the end?

A. To the best of my knowledge, yes, sir.

Q. Did your Company obtain the permission of the Defendant to use any pictures, his pictures, and pictures of the trial in connection with this commercial?

A. No, sir.

Q. Do you have any ideas about your listening audience, extent of your listening audience?

A. I believe I have.

Q. What would you say the size of your audience would be—well, first, let's say your Monday morning program, September 24th, do you have an estimate or opinion of it? [fol. 1050] A. To be honest with you, I think the day time coverage of the trial was rather limited.

Q. What is your idea about the number? Do you have any?

A. No, I don't have, off-hand. It could be in the thousands as far as day time audience.

Q. Now, tell me about the night time audience.

A. The night time audience, I feel this broadcast belonged in this court room and that is why we wanted it on at night, to reach a larger audience, and who would not see it during the day, and I would guess that our night time audience, though I have no way of figuring it, I would say that it reached—I think a guess would be probably a hundred thousand.

Q. You think that is in your Dallas area that you are talking about?

A. That is right. The total count for the Dallas-Fort Worth area, which we serve, is around 760,000 sets. That is the maximum.

Q. And you estimate something at or over one hundred thousand for Monday night's program?

A. Yes, sir.

Q. And that does not include, as you have indicated, [fol. 1051] the number of viewers in Smith County?

A. That is correct.

Q. Then Tuesday morning, tell me about your commercials.

A. Tuesday morning we had absolutely no commercials in the trial. Began our live coverage at 9:00 A. M.

Q. What happened immediately before nine A. M., during the five minutes before 9:00 A. M.?

A. Immediately preceding the beginning of the live telecast at 9:00 o'clock, we had a 20-second announcement of TV Guide and an eight-second announcement calling attention to the fact that this was a taped telecast and we had

our station identification on it. This was at nine o'clock. At 9:26, in a lapse of proceedings in the trial, we ran a 40-second announcement calling attention to a program on the air—not a commercial announcement. It was a promotional announcement of a program.

Q. Promotion of the program that your station was going to carry?

A. Going to carry. We also carried station identification at 9:26. We returned to our regular program at 10:00 A. M. [fol. 1052] We came back to the trial at 1:29 P. M. to 1:52 P. M. and there were no commercials in any of the live telecasts on Tuesday.

Q. How about just before and after the proceedings in the afternoon? Two sessions, one earlier and one later in the afternoon.

A. We had a one-minute announcement on at—(Looks at log) We had another TV Guide announcement of twenty seconds; we had a 20-second commercial announcement on our news cast and we had station identification, two seconds.

Q. Did you finish?

A. Yes.

Q. I just wanted you to cover those just before and after the proceedings that afternoon.

A. I have.

Mr. Cofer: Pass the witness.

Examination.

By Mr. McGowen:

Q. Mr. Shapiro, do you regularly testify as a witness in court?

A. This is my first experience and I hope my last.

Q. Let me ask you something. During the time that you [fol. 1053] have been testifying, have you been disturbed by these people at the press table over there or by the cameras behind the screen in the back of the room?

A. I didn't know they were there.

Mr. McGowen: Thank you.

Examination.

By Mr. Hume Cofer:

Q. You didn't know the cameras were back there?

A. Not while I was testifying. I was concentrating on your questions.

Mr. Cofer: Pass the witness.

By the Court:

Q. Do you hear any noise in the court room at this time except the air conditioner blowers here?

A. No, sir.

Mr. Hume Cofer: We have no further questions for Mr. Shapiro.

Examination.

By Mr. McGowen:

Q. With respect to television business, I assume that most of the revenue is derived from commercials, the sale of commercials and advertising?

A. That is what keeps us in business.

[fol. 1054] Q. Would that be the same for newspapers?

A. Correct. If it were not for these commercials, we would not have been able to afford to have come down and covered the trial, in the first place, which I think is in the public interest.

Mr. McGowen: That is all. Thank you, Mr. Shapiro.

Mr. Hume Cofer: Thank you very much.

Recall of MARSHALL PENGRA for further examination.

By Mr. Hume Cofer:

Q. Mr. Pengra, there is one other question I would like to ask you. You are Marshall Pengra?

A. Yes.

Q. On recall to the stand. Tell us about any replays of the Estes proceedings within the last—well, since the end of the proceedings on the 25th of September.

A. Only on the night of the 24th, if I have my dates correctly in mind, which was the only release. That was the Estes tape that WFAA released and we carried it simultaneously as they released it. We have made no other re-[fol. 1055] lease of any type of tape. As a matter of fact, we do not own a tape machine, so we couldn't handle this.

Q. Have you had a film feature concerning the proceedings during the last four weeks?

A. What do you mean by film feature?

Q. Have you had any transmission of pictures over your station—pictures of the Estes trial proceedings since September 25th?

A. Only in the form of news clips that would reference the time of the trial, taking up again and so on, that I recall. Is television on trial here or is this another matter, Mr. Cofer?

Mr. John D. Cofer: Now, Your Honor, we think the witness should be instructed that he is supposed to answer questions and we are not supposed to answer.

The Court: Just answer the questions.

Mr. John D. Cofer: I will state to Your Honor that I think that it is justice that is on trial here and television has nothing to do with this proceedings and ought not to be in here.

[fol. 1056] Mr. Hume Cofer:

Q. Are you familiar with the Television Cable Company that operates in Tyler?

A. I am familiar with it. I know that it operates here.

Q. Do you know how many customers it has?

A. No, I don't.

Q. Do you know approximately?

A. I have heard various figures but I would not attempt to comment on something that I am not fully acquainted with.

Q. Do you have any figures about the extent of your audience? KLTU.

A. We have a potential viewing audience, according to our power and our location, of some 139,000 television homes in approximately twenty-eight county area. This is based on measurement that indicates that there are that many homes who could receive our station—signal within the twenty-eight-county area.

Mr. Cofer: Pass the witness.

Examination.

By Mr. McGowen:

Q. I would like to ask you, Mr. Pengra: during the time [fol. 1057] that you have been answering Mr. Cofer's questions and testifying, have you been disturbed by any activities behind the screen in the rear of the court room?

A. No, sir, I haven't.

Q. Have you been disturbed by the activities of the press at the table, sitting here in the court room?

A. No, I haven't.

Q. Have you been disturbed by the clicking of the cameras or have you heard any clicking?

A. There are no clicking cameras in the court room, to my knowledge. I looked them over pretty carefully today. That was one of the things that was going to disturb. Those are electric cameras; they don't click and they don't grind.

Q. Have you been disturbed by anything while in the court room and while you have been testifying?

A. Principally, the questions by the defense—

Q. Other than what Mr. Cofer has asked you?

A. No, sir.

By the Court:

Q. Mr. Pengra, I notice that you have been sitting over in the jury box. While sitting there, were you facing the [fol. 1058] cameras?

A. No. You have to make a direct turn when you are seated in the jury box and make a specific effort to look at the cameras. During the intensity of a bit of questioning with any witness as inexperienced as I, I can assure you

that just about everything else is closed out of your mind if you are concentrating on the questions that are given you. I felt the same as Mr. Shapiro. I had forgotten all about whether there were cameras here or reporters here. It is a pretty heavy piece of concentration on the questions that are directed at you.

Examination.

By Mr. Hume Cofer:

Q. Mr. Pengra, suppose that you were involved in a business transaction with Billie Sol Estes, and you knew that there were one hundred million people in the United States that know about Billie Sol Estes and that they were going to learn about your business transaction with him: do you think there is any possibility that you might give that some thought?

[fol. 1059] Mr. McGowen: Your Honor, I object to that. It calls for a conclusion of the witness and besides that, it poses a hypothetical situation and calls for expert testimony.

The Court: I am going to sustain the objection. I think you are getting into the realm of speculation now.

Mr. Hume Cofer: Note our exceptions. We think it is proper in connection with the witness' speculation about his reaction to this trial. Of course, this witness doesn't have any connection with Mr. Estes—and couldn't have any pre-occupation—

The Court: He has testified as to his knowledge as a witness, and we don't want to get into the realm of speculation.

Mr. John D. Cofer: Your Honor, we would like to call the attention of the Court, and ask the Court to entertain the proposition that the attitude of this witness is such that we are complaining of as to the publicity of this case. That [fol. 1060] this witness testifying has shown a particular desire to take issue with the Defendant's efforts in this court room to obtain a fair trial; and we say that the attitude of this man who doesn't know the Defendant, but has learned about him largely through what he is saying on his own television set and through news media demon-

strates his ability of the general and bias in this community to give the Defendant at this time a fair trial. We are going to bring that up later in a subsequent Motion, after Your Honor has ruled upon this matter, but we think it is proper that the Court should take particular notice that this witness is prone to be incensed—the idea that Defendant should question his right to commercialize the unfortunate circumstances under which he is being subjected to in this court.

The Court: Mr. Cofer, of course, I can't govern people's attitudes and I feel like this gentleman here is trying to protect his rights for news; and he has not shown prejudice, and I can't go with you on that. Overrule.

[fol. 1061] Mr. John D. Cofer: The thing that I was objecting to, Your Honor, is the fact that this witness has stated the only annoyance that he had in this room was being questioned by the Defendant's lawyer. Now, I resent that. Why shouldn't this man be willing to be questioned by the Defendant's lawyer, as well as by the State lawyer?

The Court: He has been questioned by you.

Mr. John D. Cofer: I objected to him expressing his resentment, Your Honor.

Mr. McGowen: Your Honor, I believe Mr. Cofer would like to have the record read back. I don't believe that is what the witness said.

Mr. John D. Cofer: I might have misunderstood him and I don't care to have it read again, but as I understood this witness when he said "Is television on trial here". We are certainly trying to present something that we very strongly believe in, that television shouldn't be a part of [fol. 1062] this trial; and evidently he feels that this trial ought to be held, together with Defendant convicted and let him take pictures of it while it is going on.

Mr. Pengra: May I answer that, Judge? Am I entitled to answer that?

The Court: Yes, you may state your feelings since he has charged you with that. You may state your feelings to the Court. Go right ahead.

Mr. Pengra: Mr. Cofer, I think that you—

Mr. John D. Cofer: Your Honor, I object to this witness addressing me. He can address the Court but I have nothing to say to him.

The Court: Address the Court, Mr. Pengra.

Mr. Pengra: Your Honor, I think Mr. Cofer is attempting to read into my answer some animosity towards his client in a tendency to identify me with what he believes the general public believes about his client. I would like to [fol. 1063] have it very completely understood that the line of questioning that the Defendant has developed as far as television coverage of this trial is concerned, concerns me primarily as a news media that should have the right of any other news media to cover an important feature of the news, which, in this case, is this trial. If the actual proceedings that take place here can properly be presented by the newspapers and their reporting, certainly there can be no question as to the very accuracy of the camera and the recorded sound where permitted to bring the public this same information.

My principal feeling of resentment has not anything to do with the client in this particular case, the Defendant himself, but with what seems to be a rather obvious attack on the rights of a mature news media, the television industry. I hope I am clear on that, sir.

Mr. Hume Cofer: We have no further questions.

Mr. McGowen: No further questions.

[fol. 1064]

Recall of FERD KAUFMAN for Further Examination.

By Mr. Hume Cofer:

Q. You are Ferd Kaufman?

A. Yes, sir.

Q. You attended the September proceedings in this case, did you not?

A. Yes, sir.

Q. Tell me whether or not this photograph marked Defendant's Exhibit 5 is one of the pictures which you took at the September proceedings.

A. Yes, sir.

OFFER IN EVIDENCE

Mr. Hume Cofer: We offer this exhibit, "D-5", and that is all. (Photograph forwarded as original exhibit).

Examination.

By Mr. McGowen:

Q. I assume that this picture would represent Mr. Dennison, Mr. Cofer and Mr. Estes—seem to be discoursing there. Did you take many, many pictures?

A. Yes, sir.

Q. You didn't just limit the pictures to taking for Mr. Dennison and Mr. Cofer and Mr. Estes, those four?

A. No: I think there were pictures of, we will say, [fol. 1065] everything that moved.

Q. I would like to ask you, does that picture as introduced by the Defendant, does that accurately represent the conditions in the court room at the time it was taken?

A. Yes, as I recollect, this was made during a recess and the gentlemen were there at the table, and I doubt seriously if they were aware that the picture was made until it was published.

Q. Were those the same conditions as depicted here by this picture are not present today, are they?

A. No, sir. You see no live television as depicted in this picture.

Examination.

By Mr. Hume Cofer:

Q. The live television to which you referred to is the large camera on the left edge of the picture?

A. That's right.

Mr. Cofer: No further questions.

Your Honor, we do request the opportunity to have a couple of pictures taken of the structure that we have already mentioned, and we have a man here for that purpose. [fol. 1066] The Court: Don't count that camera against me that you are going to bring in. That will be your

camera. I understood he wanted to come in and take some pictures and I don't want to be charged with that camera.

There is no objection to bringing it in, Mr. Cofer. The only thing I want to make clear is that if you are going to bring a camera in here, I don't want it counted as something I have brought in here; and I want it understood that the Defendant is bringing it in. I am not questioning his being an expert and his integrity, but I just want to get it straight where the camera belongs. Not something I have brought in here. I want it understood that the Defendant is bringing it in here.

Mr. John D. Cofer: We want to take a picture of the court room for the purpose of our testimony of the situation as it is.

Mr. Hume Cofer: This gentleman, Your Honor, is not a press photographer and he has asked permission to use [fol. 1067] a flash for these two or three pictures that he is making.

The Court: With the understanding that there is no objection on Defendant's part.

Mr. Hume Cofer: We requested it, Your Honor. He doesn't have the press equipment.

The Court: With that understanding, it will be all right; that the Defendant agrees to that.

OTIS T. DUNAGAN, JR., being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

Q. Tell us your name, please, sir.

A. Ed Dunagan.

Q. Where do you live, Mr. Dunagan?

A. Austin.

Q. And what is your place of business there?

A. KNOW radio.

Q. In—with offices there in the capital building in [fol. 1068] Austin?

A. Correct.

Q. How long have you been with KNOW?

A. About two years.

Q. What facilities are here in Tyler in and around and next to the court room, which are available to KNOW?

A. Basically the same thing we had last month which consists of a: amplifier, telephone, tape recorder and a microphone.

Q. Are you broadcasting the proceedings over the radio?

A. Not live.

Q. What do you do? Do you have regular hourly announcements or periodic announcements?

A. No, we do not.

Q. Are you taping the proceedings?

A. We have been taping so far this morning, mainly as a means to monitor what occurs in the court room and not as a play-back.

Q. Is it available for play-back if any of the stations in your chain wish to play it back?

A. I believe probably now, not.

Q. Tell me whether—it is true, is it not, there are six [fol. 1069] stations in the network that your station is a member of?

A. You are referring to the Wendell-Mays Stations?

Q. Yes, I am.

A. There are seven.

Q. Are the proceedings being broadcast by any radio station or company?

A. Not to my knowledge.

Q. Is there another facility in there that you know about, or should we ask him about that?

A. There is another facility in there and perhaps you had better ask him about it. I can say that he is not broadcasting live.

Q. Have you made or do you plan to make any announcement from the room next to the court room concerning this trial?

A. Yes, we do.

Q. What is the nature of those?

A. They are, basically, one minute reports to be made as we feel events occur that are worth reporting.

Q. And your equipment is located in the room between—that it occupied at the September proceedings? That is in [fol. 1070] the room between the hall and the jury box? End of the jury box.

A. That is correct.

Mr. Hume Cofer: I believe that is all.

By the Court:

Q. Let me ask you. You don't operate in the court room at all?

A. We do not.

Mr. Hume Cofer:

Q. What microphones are available for the use of your equipment?

A. The two court room microphones, the one here on the witness stand and the one on the Judge's Bench.

Mr. Hume Cofer: That is all.

Mr. McGowan: We have no questions.

CHUCK FOSTER, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. Hume Cofer:

[fol. 1071] Q. State your name, please, sir.

A. Chuck Foster.

Q. Where do you work?

A. KTBB, radio station.

Q. What place?

A. In Tyler.

Q. Does KTBB have any radio equipment in the room next to the court room?

A. Yes, we do have.

Q. What equipment is that?

A. We have an amplifier, sound amplifier and microphone.

Q. What is the purpose of that equipment and what is it being used for now?

A. At this moment, it is feeding the trial to our studio where it is being taped.

Q. It is being taped at the studio?

A. Yes.

Q. It is not being broadcast?

A. No, sir.

Q. Will it be available there for a broadcast at a later date?

A. I assume it will be available but it is not meant to be used that way.

[fol. 1072] Mr. Hume Cofer: I believe that's all.

Q. Oh, you are using the same microphones that the other facility is using, the court room microphone?

A. The court room microphones.

Mr. Cofer: That's all.

Examination.

By Mr. McGowen:

Q. I would like to ask you, have you been, in any way disturbed by the activities of the press people at the table or the cameras behind the screen at the rear of the court room?

A. No, sir, I have not.

Q. Were you even aware that they were here while answering Mr. Cofer's questions?

A. Not at the moment I was answering the questions.

Mr. McGowen: No further questions.

OFFER IN EVIDENCE

Mr. Hume Cofer: Your Honor, may we offer now the photographs which Mr. Faulkner has taken, even though [fol. 1073] they are not ready?

The Court: All right.

[fol. 1075] Mr. McGowen: I don't know who is in charge of the cameras there. I would like to put Mr. Dennison on the stand here and see if he can tell when they are on and when they are off.

JOHN DENNISON, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Examination.

By Mr. McGowen:

Q. Mr. Dennison, if you will just face this other direction, I am particularly interested with respect to noise. If you will face that way (indicating). We will cut all of them off and then signal to turn them on and see if you can tell any difference; if so, will you signify to us that you can hear them in operation. Are they all off? Just tell us, Mr. Dennison, any time you hear a change, when they go on.

A. I can hear something but I am not familiar with the noise.

Q. Do you hear any noise now, Mr. Dennison? Do you hear any more noise now than you did when you first faced the wall?

[fol. 1076] A. Not that I can identify.

Mr. McGowen: Thank you, Mr. Dennison.

Mr. Hume Cofer: May it be stipulated they were not all running?

Mr. McGowen: Well, I would like for Mr. Dennison to come back then and have them all running.

Recall of JOHN DENNISON for Further Examination.

By Mr. McGowen:

Q. Mr. Dennison come back and face the wall, please. Now, tell me, Mr. Dennison, any time that you hear a perceptible change in the noise.

A. I hear something but I don't know what it is.

Q. Do you hear any more now than you did when you first went there, Mr. Dennison, and faced the wall? Do you hear any distraction?

A. I can hear something but I cannot identify it.

Q. Does it distract you?

A. Well, I think it would distract the witness.

Q. But not yourself?

A. No, sir.

[fol. 1077] The Court: Is that all for the State on the Motion?

Mr. McGowen: Yes, sir.

The Court: All right, Mr. Cofer.

RENEWAL OF MOTION TO BAN CAMERAS, ETC. AND COURTS' RULING THEREON

Mr. Hume Cofer: Your Honor, we state again the grounds on which we renew our Motion.

That Defendant moves and asks the Court to take and require that all cameras, still and television and news reels and movie cameras be instructed to remain out of the court room. The Defendant takes the position that the presence of the cameras interferes with his rights to a fair trial, constitutes an imposition on due process with respect to the Defendant, impedes the activities of his attorneys in consulting with him and conducting the trial of the case; distracts jurors, leads the jurors to be constantly aware of the publicity attached to the case, and is calculated and likely to distract the witnesses to the extent that the witnesses' testimony may be inaccurate or conceivably untruthful, and we [fol. 1078] do move that all cameras be removed for those reasons.

Mr. McGowen: Your Honor, of course, this is within Your Honor's discretionary powers and our efforts have been to develop the full facts and not with respect to—not necessarily what the State desires, and the State would not want the trial to be interfered with in any way. Our cross examination is to bring out the complete facts and this is a matter within Your Honor's discretionary power.

The Court: First, there are six microphones in the court room and four of them belong to the Court. Smith County

jurors are used to microphones and I don't think it would excite them one bit. They see them in my court room; they see them in Judge McKay's court room and they see them in Judge Loftis' court room and I don't think you need have any fear of upsetting jurors in this case at all.

As I said before, out of the six four belong to the Court. This matter can't be passed on as far as the Court is concerned [fol. 1079] from the matter of emotion or tradition. The Court must look at this matter from a legal standpoint. This case is not being tried under the American Bar rules. I do not say that critically of the American Bar rules. That is their privilege, to have their rules and they may be good rules; but Texas has never adopted those rules or has seen fit to. This case is not being tried under the Federal Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution.

Now, the Bill of Rights, Section 10, which is a part of the Constitution of Texas, provides that every Defendant in a criminal case is guaranteed—doesn't say may—is guaranteed a public trial, and that is what I am trying to do. There are some cases under that section and the Court of Criminal Appeals, where, in one case, where the Judge issued orders that there not be anything printed about that case. The newspaper reporter reported it any way. He was cited for contempt by the Court and ordered to jail and [fol. 1080] appealed to the Court of Criminal Appeals. And the Court said this:

"Our Constitution is but in accord with the genius and spirit of our free institutions, which is intended to guaranty publicity to the proceedings of our courts, and the greatest freedom in the discussion of the doings of such tribunals, consistent with truth and decency. And as has been well said, 'When it is claimed that this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the lawmaking power'. And this imposition must be in accord with the provisions of our constitution guarantying the publicity of all trials, as well as the freedom of speech and of the press".

And the Court goes on further and says: "And even if there was a conflict here between the authority and dignity of the court, that should yield to the plain letter of the constitution."

I took an oath to uphold this Constitution; not the Federal Constitution but the State Constitution; and I am going [fol. 1081] to do my best to do that as long as I preside on this Court, and if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful. I have learned through my twenty years on the Bench that you can't satisfy all of the lawyers with your rulings and I don't attempt to. I try to satisfy myself and my conscience and I have done that in this matter. Now, a later case than that is Ex Parte Davis case written by the Court of Criminal Appeals in January of this year, and that is where the Judge had a run-in with one of the reporters and as such, he ordered this particular reporter to stay outside the Bar and the rest could come in and sit down and report the news. And the Court of Criminal Appeals said this:

"We do not deny the trial court the right to punish for contempt a reporter for conduct in the presence of the court which interferes with orderly proceedings in the administration of justice. We also recognize his authority to enter an order excluding all newspaper reporters and all other reporters"—and all other reporters would have to be TV [fol. 1082] and radio—"from inside the rail the rail of his courtroom and reserve that particular area solely for the attorneys, litigants and witnesses and court officials. We do not think, however, that a trial judge has the authority to exclude one particular individual from coming inside the rail of his courtroom and continue to allow other individuals similarly situated to come within the area encompassed by the rail."

Now, to me, the Court says if one goes, they all go; if TV and radio go, the press would have to go, and that means then that this case instead of a public has become a private trial which is in violation of the constitution, and I hope the day never comes when this country is shut off from the news.

I have no fear of people knowing what goes on in this court room. Now, on the other trial, the prospective jurors and others in Smith county or any other place did not learn any more than they already knew, and they didn't learn any more from TV and radio than they learned from the press, and that was that the Defendant had been brought here for [fol. 1083] trial and the case called. That the Defendant had filed a motion to exclude cameras; that he had filed a motion for a continuance; that the witnesses' names were called and a number found missing. That is all they learned. They learned that from the press; they didn't learn anything additional from TV or radio, and I have not yet been able to figure out how we could seat twelve jurors over here to try this case that wouldn't have learned he was under indictment and is here for trial, and that is all they have learned so far.

So with that feeling, I am overruling your Motion.

Mr. John D. Cofer: To which we except in overruling.

Mr. Maloney: Your Honor, the AP and UPI took pictures and were placed on the stand, and those pictures are being made available to the Court; and we hereby offer all of those having been testified to as the positions from where taken into the record.

[fol. 1084] We further request the Court that the photographers who took the pictures outside of the Bar before those pictures are admitted as a part of this record be put on the stand and testify from where he took the pictures, and we will object to those pictures until that particular photographer testifies from where he took them.

* * * * *

[fol. 1085] The Court: Now, Gentlemen, we will get around to what we came here for. I am calling the case, State of Texas versus Billie Sol Estes, No. 16,818. What says the State in that case?

* * * * *

[fol. 1086] The Court: Suppose we take that up this afternoon.

Now, Gentlemen, I want to remind you again of the Court's ruling on the taking of pictures behind this Bar during recess or any other time.

[fol. 1087] The Court: Except your personal lawyers and Mr. Tomlin. Outside, no one else except the lawyers in this case.

Now, also, after this case gets under way and testimony is being offered on the merits of this case, do not read—I will say from now on I will give you these instructions. These instructions are as of now. Do not read reports or listen to comments concerning this case. You understand, of course, that these are the instructions of the Court and any violation of them you will be in contempt of court—a contempt action contrary to the Court's instructions.

Let me ask you, gentlemen, attorneys in this case: I don't know how long it will be before we will need these witnesses.

[fol. 1090] Mr. Hume Cofer: We renew now, Your Honor, our Motion to exclude all cameras and sound equipment from the court room and state as an additional ground of our Motion that the presence of the cameras and sound equipment in the court room will probably result in a violation of the rule with respect to disclosure to the witnesses of the proceedings in the court room.

Mr. John D. Cofer: Also, Your Honor, permitting cameras in the court room violates the Defendant's right not only under the constitution of Texas but under the constitution of the United States and the amendments thereto, and we now urge this as denying him due process of law under the State constitution and the Federal constitution.

The Court: I suspected for that reason I said I wanted it understood that I don't hold that the rule is being violated until the witness starts testifying. That is the reason I wanted that in the record for I suspected what was coming.

Overrule your Motion.

Mr. John D. Cofer: We except, Your Honor.

[fol. 1093]

OFFERS IN EVIDENCE

Mr. Hume Cofer: Your Honor, the instrument the Reporter is now marking is D-1 and we will substitute that for the original thermofax D-1 heretofore introduced in evidence.

Mr. Holcomb: No objections by the State.

"In my statement of September 24, 1962, admitting television and other cameras in the court room during the trial of Billie Sol Estes, I said cameras would be allowed under the control and direction of the Court so [fol. 1094] long as they did not violate the legal rights of the Defendant or the State of Texas. Television and radio, being means of presenting the news, should be given equal treatment with other news media insofar as the law governing trial procedure permits.

I believe it would be the rankest kind of discrimination between the news media to refuse these two sources of reporting the news equal access to news coming from the trial of lawsuits in the court room insofar as it can be done in keeping with proper court procedure.

In line with my statement of September 24, 1962, I am at this time informing both television and radio that live broadcasting or telecasting by either news media cannot and will not be permitted during the interrogation of jurors in testing their qualifications, or of the testimony given by the witnesses, as to do so would be in violation of Art. 644 of the Code of Criminal Procedure of Texas, which provides as follows:

"At the request of either party, the witnesses on both [fol. 1095] sides may be sworn and placed in the custody of an officer and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the case. This is termed placing witnesses under rule."

If the Judicial Section of the State Bar of Texas, meeting in Austin on October 5th and 6th, does not adopt Rule 35 of the Canon of Ethics of the American Bar Association and continues to permit each Judge to conduct his court and control his court room as he

deems right and proper, as long as the law is complied with, in that event each television network and the local television station will be allowed one film camera without sound in the court room and the film will be made available to other television stations on a pool basis. Marshall Pengra, manager of Television Station KLTU, Tyler, will be in charge of the independent pool and independent stations may contact him. The same will be true of cameras for the press, which will be limited to the local press, Associated Press and [fol. 1096] United Press.

The Estes case was called for trial in Tyler on September 24th, and was not the first in Texas where television and other cameras were permitted. There have been several cases in my court in which television and other cameras have been permitted in the court room. Almost every night on television news programs, I see pictures of court room proceedings that were filmed in the court rooms. This practice has been going on for several years in my court, and other courts throughout this State.

The Estes case is not the first in which live television from the court room has been permitted. To my knowledge, there have been two others, the first one several years ago from Waco, a murder trial, I believe. However, trials heretofore telecast live from Texas court rooms were permitted by consent of both prosecution and defense legal counsel, and, therefore, any objection to a violation of Article 644 in this respect was waived. Since that time, neither the State Bar of Texas nor the Judicial Section of the State Bar have condemned such practice.

[fol. 1097] I am making this statement at this time in order that the two news media affected may have sufficient notice before the case is called on October 22nd.

The rules I have set forth above concerning the use of cameras are subject to change if I find that they are too restrictive or not workable, for any reason.

At the beginning of the Estes trial in this court, I stated that I had not invited either television, radio or the press to be here, but that they were here. However,

one news wire service in its report carried in newspapers all over the nation quoted me as having said that I had invited television, radio and press to be here. I am taking this opportunity to correct that error and requesting that wire service to make the necessary explanation for their mistake."

4:15 P. M.

The Court: Do you want to offer your pictures now?

Mr. McGowen: Yes, Your Honor. We have agreed with [fol. 1098] Defense counsel:

State's Exhibit #1 represents a picture taken from the jury box towards the rear of the court room. State's Exhibit #2 represents a photograph taken from the witness stand towards the rear of the court room. State's Exhibit #3 represents a photograph taken from behind the Judge's Bench towards the rear of the court room. State's Exhibit #4 represents a photograph taken from the witness stand towards the rear of the court room. State's Exhibit #5 represents a photograph taken from behind the Judge's Bench towards the rear of the court room. State's Exhibit #6 represents a photograph from behind the jury box towards the rear of the court room.

We would like to offer those in evidence as previously stated for the purpose of showing the conditions here on October 22, 1962.

Reporter's Note: State's Exhibits 1 through 6 being photographs as above set out are being forwarded as original exhibits.

The Court: Are those the conditions as of this date? [fol. 1099] Mr. McGowen: Yes, sir.

[fol. 1101] Mr. Hume-Cofer: Now, Your Honor, with respect to Defendant's Exhibits 7, 8, 9 and 11 through 21, we say that those are photographs taken of the court room and the court house and the surrounding area on September 24, 1962, and they are offered in support of and in connection with the present Motion for Continuance to show the extent of the activities of the news media in and around the court house on that occasion, and we do offer those and do

state and specify that they show the situation on September 24, 1962.

Mr. Maloney: They don't portray the facts on that date?

Mr. Hume Cofer: They were taken on September 24th.

[fol. 1102] Reporter's Note: Defendant's Exhibits 7, 8, 9, and 11 through 21 are photographs which will be forwarded as original exhibits with this Statement of Facts.

Mr. Hume Cofer: Then we offer the newspapers which have been marked Defendant's Exhibits 22, 23 and 24, which are the newspapers of Tyler and Dallas, on September 24th and 25th, I believe.

Reporter's Note: Defendant's Exhibits 22, 23 and 24, newspapers as identified are being forwarded with the other original exhibits in this case.

Mr. Hume Cofer: Defendant offers Defendant's Exhibit 25, which is a volume of clippings from the period of August 30th through September 24th, 1962, clippings in Texas newspapers. We offer that in support of the Motion. These are all just within three weeks of the last setting in this court, up to the date of the last setting.

Reporter's Note: Defendant's Exhibit 25, volume of clippings, is being forwarded as an original exhibit along with other original exhibits in this case.

[fol. 1103] Mr. Hume Cofer: Now, the Defendant offers all of the proceedings this morning in the hearing on the Motion to exclude cameras from the court room, all of the proceedings, exhibits and testimony which the Defendant offered this morning, the Defendant asks leave to include in this record on the Motion for Continuance; that is, the testimony this morning concerning the extent of the camera coverage of the present proceedings.

Reporter's Note: All of the previous pages of this transcript incorporate the above offer.

The Court: I believe I will let you put this back over there, Mr. Cofer.

Mr. Hume Cofer: Yes, sir. That makes thirteen big volumes and a small partial volume—small unbound volume in a box of clippings, that we have in this record altogether.

Mr. John D. Cofer: Your Honor, I was trying a case and would like to offer this with the statement that I would like [fol. 1104] to offer and will be glad to swear to it—in John-

son City and a gentlemen, whom I did not know, handed that to me.

The Court: In Johnson City?

Mr. John D. Cofer: Yes, sir, and he had a whole hand full in his pocket.

The Court: Let me see what they have down in Johnson City.

Mr. John D. Cofer: It is stipulated that I have never seen this card except in Johnson City.

The Court: At this time, I would like to say this to the Press.

I can't control them and I don't intend to, but I hope the Press doesn't print this until this trial is over. We have had enough Motions on too much publicity, and I can't control the Press, but it will be an aid in trying this case, if you don't print that where the Smith County jurors can read it, [fol. 1105] as well as others over Texas. Any other news media that might pick it up and read it. I mean all of you, radio and television.

Reporter's Note: I am presuming this is Defendant's Exhibit 27, which is a card reference to running Billie Sol Estes for Governor, but I have no positive identification of the offer by number: Same is being included with the other original exhibits.

Mr. Saunders: In support of the Motion now, if the Court please, we would like to offer some testimony, three witnesses here in the room, and you might swear them and put them under the rule.

The Court: Will you have them stand?

Mr. Saunders: Mr. Bennie Beaird, Mr. Kenneth King and Mr. A. J. Heaton.

[fol. 1106] KENNETH KING, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination:

By Mr. Saunders:

Q. State your name to the Court, please.

A. Kenneth King.

Q. Mr. King, where do you live?

A. I live in Tyler.

Q. How long have you lived in Tyler and Smith County?

A. I have lived here nine years.

Q. What profession or vocation do you follow, Mr. King?

A. Attorney-At-Law.

Q. How long have you practiced law in Tyler?

A. That same period, nine years.

Q. Do you know Mr. Billie Sol Estes, the Defendant in this case, personally?

A. No.

Q. Have you read anything about the case in which he is involved as Defendant?

A. Yes, on many occasions.

Q. Have you heard TV programs or news media on TV [fol. 1107] describing Mr. Billie Sol Estes and this case now on trial?

A. I have seen some television news items regarding some of his activities.

Q. Have you heard any discussions here in Tyler and Smith County, Texas, among the various people in connection with this case that is coming up for trial?

A. Yes, on several occasions.

Q. From what you have read, heard or seen, do you have an opinion whether or not Billie Sol Estes can receive a fair and impartial jury at this time in Smith County?

A. I have an opinion, yes.

Q. Will you please state that opinion?

A. It is my opinion that the prospective jurors in this County have already made up their minds as to the guilt or innocence of this Defendant.

Q. Then, I take it that you are stating that it is your opinion that he could not receive a fair and impartial jury trial in Smith County at this time?

A. That is my opinion.

[fol. 1108] Mr. Saunders: Pass the witness.

Cross examination.

By Mr. McGowen:

Q. Mr. King, are you familiar with the facts of this particular case?

A. No, I am not.

Q. Do you know what he is charged with in this case, being No. 16,818?

A. No, I do not.

Q. Do you know of anybody who does, amongst all of these prejudiced people that you have been talking to in your nine years in Smith County?

A. From the extent of my conversations with these people that I have talked to, not in nine years, but the past several months regarding this case, none of them knew what he was charged with but they all had an opinion as to whether he was guilty or innocent of a crime.

By the Court:

Q. Did they say they had an opinion of this one, that they didn't know anything about?

A. They indicated that they had made up their mind as to his guilt or innocence in the trial to be held here in Tyler.

Q. They didn't say whether or not some one had told [fol. 1109] them what the facts were or the purported facts of the case?

A. Not particularly, Your Honor. Most of them were basing their statements on what they had heard from television programs and read in the newspapers and heard on the radio regarding the trial.

Cross examination.

By Mr. McGowen:

Q. Have you heard anything from TV station or on radio and in the newspapers about the facts of this case, Mr. King?

A. I have seen myself some things that purport to be the facts in this case.

Q. What do you know about this case? You are an attorney here; you have read everything. Tell us about this case.

A. I know nothing about the case except what I read in the newspaper and on television.

Q. Now, have you read any facts or what are purported to be facts in the newspapers or on television?

A. Yes, I have heard something.

Q. What did you read?

A. I read in the newspaper that there are serial numbers [fol. 1110] on these fertilizer tanks have been changed or misplaced or altered in some manner, for one thing.

Q. Is he charged with changing serial numbers?

A. I don't know what he is charged with. I haven't read the indictment.

Q. And you have not seen it reproduced in newspapers either, have you?

A. No, I have not. I might further add that I have also read in the newspapers about the fictitious chattel mortgages and other items concerning fertilizer tanks.

Mr. Saunders: We have no further questions.

Mr. McGowen: Just one more question.

Q. You, yourself, do not know what the particular facts are supposed to be in this case nor have you talked with any resident of Smith County who does; is that correct?

A. I have talked to several people who think they know what the facts are.

Q. About this particular case?

A. Yes.

[fol. 1111] Q. Who is one of them?

A. Well, have talked to several of them. I could give you a pretty good list of names.

Q. All right, let's start out on them now.

A. Ralph Whitten.

Q. He knows what the facts are?

A. I didn't say he did.

Q. I thought you said he thought he did.

A. I said he thought he did.

Mr. Saunders: Your Honor, we object to counsel arguing with the witness and ask that he be instructed to give the

witness an opportunity to answer the questions as propounded.

The Court: All right.

A. He said he thought he did. All of these people say they thought they did. I don't know what they know. You understand that; and a former member of the jury panel, Jack Fite. I talked to a member who is coming up on the jury panel. I have also talked to Ennis Broussard. I have talked to Oscar Martin; several of them; lot more, Tom Moore. I could give you a pretty good list. It is the general discussion around coffee shops in this town.

Q. You have mentioned here about six or seven individuals.

A. Do you want me to keep going?

Q. You have not told me what facts they say they know. That is what I want to know. I don't doubt that you have talked to a lot of people, but what I am interested in, do they think they know whether the Defendant is innocent or guilty of this particular crime. I want to know if they know what the facts are.

A. I didn't debate it with them. All I know is that they stated to me they thought they knew what the facts were and they had an opinion as to his guilt or innocence.

Q. What is the population of Smith County?

A. I imagine close to a hundred thousand.

Q. And it is your opinion that just normal procedure, out of one hundred thousand people and people eligible for jury service, that you could not get a fair and impartial jury in this County; is that right?

A. That is my opinion, yes.

[fol. 1113] Mr. McGowen: That is all.

The Court: That is all, Mr. King.

BENNIE BEAIRD, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direction examination.

By Mr. Saunders:

Q. State your name to the Court, please, sir.

A. Bennie E. Beaird—B-e-a-i-r-d.

Q. Mr. Beaird, where do you live, please?

A. 1001 North Bois d'Arc.

Q. How long have you lived in Tyler or Smith County, Texas?

A. All my life with the exception of two years in World War I.

Q. Have you or not held any official position with the County of Smith in the past?

A. Yes. I was County Commissioner four years.

Q. Do you know the Defendant in this case, Mr. Billie Sol Estes?

A. I do not.

Q. Have you read anything about him in the newspapers [fol. 1114] recently?

A. Practically every day.

Q. Do you have a television set, Mr. Beaird?

A. I do.

Q. State whether or not you have seen the proceedings of this trial on September 24th, 1962, on your television screen.

A. I did.

Q. Do you own a radio, Mr. Beaird?

A. I do.

Q. State whether or not you have heard any comments, news or purportedly news of this trial and its proceedings prior to today.

A. Yes, I have.

Q. State whether or not you have, in your daily activities, heard this matter discussed by citizens of Smith County.

A. I have.

Q. Once or more than once?

A. Several times.

Q. From all of that discussion, from what you have read, seen or heard, do you at this time have an opinion as to whether or not Mr. Billie Sol Estes can secure a fair and [fol. 1115] impartial trial in Smith County at this time?

A. I would say it would be very difficult to get a jury—from conversations that I have heard among the people who have discussed it.

Q. By that, do you mean to say that it could not be possible but that you think it would be difficult?

A. It would be very difficult, I would say.

Q. Do you know whether or not, or are you willing to state that it would be improbable that a fair and impartial jury could be selected at this time?

A. I wouldn't say it would be impossible.

Q. The word used was improbable.

A. It probably could be.

Mr. Saunders: Pass the witness.

Cross examination.

By Mr. McGowen:

Q. Do you, yourself—

Mr. Saunders: Pardon me. May I ask one other question?

The Court: Go ahead.

Q. Do you know, yourself, Mr. Beaird, what Mr. Estes is [fol. 1116] charged with?

A. No, I do not.

By the Court:

He is talking about now the proof in this case.

Mr. Saunders:

Q. In this particular indictment.

A. The only thing I saw, it was four cases being transferred to this County and I don't know what he is going to be tried on, which one of them, or anything about it.

Q. Do you think that that makes any difference with reference to the opinion that you have and which you have expressed?

A. No, I wouldn't see where it would make any difference. If he is guilty on one, he might be guilty on the others, if you could prove it.

Q. In other words, your opinion is based upon the news media and not any specific charge for which he is not on trial?

A. That's right.

Mr. Saunders: Pass the witness.

Mr. McGowen: No questions.

[fol. 1117] The Court: May Mr. Beaird be excused?

Mr. McGowen: Yes, Your Honor.

The Court: You are excused from the rule, Mr. Beaird, and you may go back in the court room.

A. J. HEARON, witness called by Defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination.

By Mr. Saunders:

Q. State your name to the Court, please.

A. A. J. Hearon.

Q. Where do you live, Mr. Hearon?

A. Whitehouse.

Q. That is in Smith County?

A. Yes, sir.

Q. How long have you lived in that vicinity, Mr. Hearon?

A. All my life.

Q. Mr. Hearon, do you take any type of daily newspaper?
[fol. 1118] A. I do.

Q. Do you have a radio?

A. I do.

Q. In your home, I am speaking of. Do you also have a TV set?

A. Yes.

Q. Do you know the Defendant in this case, Mr. Billie Sol Estes?

A. I have met him on one occasion.

Q. Where did you meet him, Mr. Hearon?

A. In Pecos.

Q. At that time, did you have an opinion and so express it as to whether or not Billie Sol Estes could receive a fair and impartial trial in Smith County, Texas?

A. I did.

Q. What was that opinion?

A. Well, I figured that he would have a pretty hard time getting a jury here in Smith County.

Q. Did you so express it in court at Pecos on that occasion?

A. I did.

Q. Since that occasion, the case has been transferred to [fol. 1119] Tyler, Smith County, Texas; is that correct?

A. Yes, sir.

Q. Have you read anything in the newspapers about this case since it was moved here?

A. Well, yes, several times.

Q. What about hearing it on radio? Do you have an occasion to hear anything about it on radio?

A. Heard it on TV and radio both.

Q. From what you have heard, read or seen, or heard any discussions on it, have you heard any discussions around Whitehouse, Mr. Hearon?

A. Well, quite a bit; small town, you know.

Q. From all of those sources, do you now have an opinion as to whether or not Billie Sol Estes can receive a fair and impartial trial in Smith County, Texas, at this time?

A. Well, I wouldn't think so because it would be a pretty good job to get a juror, as much publicity as has gone on.

Q. I take it your answer is that it is your opinion that he could not receive a fair and impartial—

[fol. 1120] Mr. Holcomb: That was not his answer. Your Honor.

The Court: Let him answer what his opinion is. What is your opinion in that regard, Mr. Hearon?

Mr. Saunders:

Q. What is your opinion in that regard at this time, Mr. Hearon?

A. Well, if any one sat on it, if he can read and write, he is going to know all about it; listening to radio or TV. If he can't read and write, he shouldn't be on the jury.

Mr. Saunders: Pass the witness.

Cross examination.

By Mr. McGowen:

Q. Mr. Hearon, I remember you out at Pecos—

A. Yes, sir.

Q. You came out there and testified back in the middle of July that the Defendant couldn't get a fair trial in Smith County—

A. That's right.

Q. —and I asked you then if you knew what he was charged with and you didn't know. Do you know now?
[fol. 1121] A. No, not exactly.

Mr. McGowen: No further questions.

Redirect examination.

By Mr. Saunders:

Q. Has your opinion been strengthened or lessened since you testified in Pecos?

A. Well, it has been strengthened. There's been so much publicity about it.

Mr. Saunders: That is all. Thank you, Mr. Hearon. No further questions.

Recross examination.

By Mr. McGowen:

Q. You still don't know what he is charged with?

A. No. I have read so much, I don't know what he is charged with.

Redirect examination.

By Mr. Saunders:

Q. Would it make any difference to you, whatever he is charged with, so far as your opinion is concerned?

A. I wouldn't think so.

The Court: May he be excused from the rule?

Mr. Saunders: Yes, sir. You may sit in the court room if you like.

[fol. 1122] Mr. Saunders: We have no further witnesses in support of the Motion, Your Honor.

OFFER IN EVIDENCE

Mr. Hume Cofer: We have one other exhibit, Your Honor, today's issue of Tyler Courier Times, front section, concerning coverage today, that is out on the news stands today in Tyler with jurors still at large. We offer that as Defendant's Exhibit 26.

Reporter's Note: This exhibit as above identified is being forwarded as an original exhibit with this Statement of Facts.

Mr. Holcomb: Let the record reflect, Your Honor, that the State's Controverting Affidavit to Defendant's Motion has been filed.

The Court: It is filed and before the Court.

Mr. Hume Cofer: That concludes the testimony on the Motion, Your Honor, and we submit the Motion to the Court.

[fol. 1123]

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Now, let me point this out. Now, the State has filed a Controverting Affidavit as stated there, and this is the second Motion. You take the position that it is the first Motion. Now, the record needs to be clear for some Appellate Court, if it gets that far, so they can know whether it is or not.

I think the best way to do that is to put in the record your first application was filed last September—and the style.

Mr. John D. Cofer: That is considered the original, Your Honor.

The Court: Is it attached?

Mr. John D. Cofer: We refer to it as an exhibit attached to it.

Mr. Hume Cofer: We ask leave to attach that document the Court is holding in his hand, that document itself, to Defendant's application.

The Court: That will be a part of that.

Mr. Hume Cofer: Yes, sir.

[fol. 1124] The Court: That is the only way I know to get the facts before them, because on September 25th, the Court overruled your Motion pertaining to so much publicity that he couldn't get a fair trial at that time, and granting your Motion for absent witnesses. I want the record to show that and they can be the judges of whether it is the first or second.

Mr. John D. Cofer: So far as witnesses were concerned, that was our first, but when the Court overruled us and didn't grant a continuance on the point of publicity, we have never had a continuance on that, Your Honor, and this is a renewal of that part of our first application. The facts are there.

The Court: I just want to be sure the facts are in there and let some other Court, if necessary, pass on whether or not it is the first or second.

Is that all now for all of you on this Motion?

[fol. 1125] Mr. Holcomb: The State has nothing further to offer, Your Honor.

Mr. John D. Cofer: Your Honor, maybe we could make some progress here. You know these things escape my mind. The original indictment—what I was going to say, we might save some time here.

Your Honor at this time—

The Court: Are we still talking on this Motion?

Mr. John D. Cofer: No, sir.

The Court: Let's dispose of that. The Court overrules the Motion for continuance at this time.

Mr. John D. Cofer: To which we except.

Before we start selecting a jury,—we have no further motions at this time, Your Honor.

So, since the Court has overruled our Motions, subject to those Motions, we will be ready to start selecting a jury.

[fol. 1126]

MOTION TO REQUIRE STATE TO ELECT COUNT AND MOTION TO EXAMINE JURORS INDIVIDUALLY AND RULINGS THEREON

Now, before we start selecting the jury, though, we would like to ask at this time that the State be required to elect on which count they expect to stand in this four-count indictment so that we may know, in interrogating the jury, to tell the jury of what offense he is accused. Now, that is necessary because the indictment reflects that it is not based on the same facts and evidence, and it is an effort to allege he is guilty of swindling; he is guilty of theft; he is guilty of embezzlement, and then he is guilty of embezzling or stealing—embezzling, I believe that is theft by bailee, of some entirely different property other than the ones they are relying on in the first three counts.

Under those circumstances, we are entitled to interrogate these jurors, from the standpoint of the defense, on which the State expects to try and offer evidence; and they are bound to know by this time what their evidence is and what they expect to rely on; they will be in no better shape at a later time to make the election as to which count, and we [fol. 1127] ask that they be required to elect because we cannot safely and adequately examine the jury without knowing what offense we are to answer.

Mr. McGowen: Your Honor, the State feels that now is not the time they should have to elect. We have authorities for Your Honor, didn't dream we would reach that point and would be arguing about election at this point. Our position, Your Honor, is that now is not the time for election.

Mr. John D. Cofer: We do not care to argue it, Your Honor.

The Court: I will withhold my ruling on it until you—I see your authorities on it. The Court will rule before you start the interrogation of the jury.

Mr. John D. Cofer: Now, Your Honor, we are not going to oppose the examination of these jurors individually and separate and apart from each other. We want to make that

clear. We make the request that we be permitted to make [fol. 1128] the examination of each juror individually and separate and apart from each other.

Mr. McGowen: Your Honor, our position is, this is a felony case like any other felony case and the rules do not envision a separate examination of the jury panel. It is discretionary with the Court and we feel that the normal provisions—this is just another felony case.

Mr. John D. Cofer: It has been held in Federal Court, Your Honor. I do not have any Texas authorities on it now but where the matter of publicity is involved, such as in this case, will be glad to give it to Your Honor, where it has been held error and the case reversed for no reason except the Court did not permit separate interrogation of the jury, individually. I will state to Your Honor that Judge Starley attempted to examine the jury en masse and it was the result of that manner of examination that made it impossible to get a jury—

Mr. McGowen: Your Honor, I would like to object to that.

[fol. 1129] The Court: Just a minute. Let him finish, then I will hear you.

Mr. John D. Cofer: We attempted it for about three days and it became apparent that jurors learned the answers after the first two jurors, and that after that, they all gave the same answers and then we would have to call them up separately; almost every juror was called up separately to the Bench and interrogated separately. Then we began weeding some of them out, but it became obvious to the Court and obvious to all parties that that jury was finally relieved and disqualified, but there wasn't anybody there that was fair and impartial on that jury panel; and as a result of the manner in which the interrogation had to be carried on in order to weed out those people. There were people in Pecos trying to get on there to convict the Defendant and people trying to get on there to acquit him, and by the time—these people hearing the answers and the manner in which we had to argue with those jurors in order [fol. 1130] to disqualify some of them made it absolutely impossible for the rest of the jury to constitute a fair and

impartial panel; and for that reason, this case was transferred here, because of the manner in which that jury was selected. And it doesn't save any time, Your Honor, because you have to do it separately any way. You have to get up here and we don't have a fair opportunity to interrogate them where in order to disqualify some of these men and ask them the things that they know about, you have to give the disqualifying information to other jurors and tell them things that disqualify them themselves; and we say that the only method where we will ever be able to get a fair jury, aside from the fact that the Court of Appeals—I believe either the Second or Third Circuit, reversed a case even where the Court interrogated them, and attempted to qualify them. They said that that didn't mean the situation where there was publicity because the Defendant had the right individually, separate, all jurors and interrogate each juror about what he had read, what he had seen and the influence it had upon him.

[fol. 1131] As I say, the case was reversed and it has been accepted generally as the proper method in publicity cases of much less publicity than this, that separate interrogation is essential to due process.

The Court: I would like to have that authority, Mr. Cofer.

Mr. McGowen: Your Honor, I didn't mean to interrupt Mr. Cofer but Mr. Cofer made the statement concerning the reason why this case was transferred, that they couldn't get a jury, etc. I would just like to clear the record on that.

There were thirty-two qualified jurors present at the time Mr. Cofer made his Motion for continuance. He may attribute reasons to the Court and to people who were on the panel why they wanted this or that and may attempt to say that they did not answer the questions honestly and truthfully, but that is something not within his knowledge.

We feel the rules do not provide for separate interrogation of the jury panel in a non-capital case. We feel, however, that it will probably be discretionary with the Court. We don't feel too strongly about it, save for a question of time. It would be extremely more time-consuming, we feel.

Mr. Holcomb: Your Honor, the State would further state to the Court that unless and until the rules of criminal procedure, governed thereby, by Article 620, which provides for separate interrogation of prospective jurors, but there is no statutory authority as submitted by counsel for the Defendant or the State of Texas; nor does he claim to bring before the Court any authority in regard to the statutory or—Therefore, we suggest and request the Court to allow us, which is within the discretion of the Court, to examine the jurors as a panel, as in other ordinary felony cases.

The Court: I will pass on this in the morning.

Mr. McGowen: Your Honor, I would like to clarify the [fol. 1133] State's position: 1. If Your Honor feels the ends of justice require it, we want a just and fair trial, but we submit to the Court that it is unusual and it is not provided for in the rules. We don't want to run into a problem either way we go.

The Court: I want to read your authorities and see what I find.

Mr. John D. Cofer: In the first place, Your Honor, that is the cardinal of criminal rules.

In the second place, there is a statute that provides that it must be done in capital cases.

I am sure that Your Honor this morning, in session, when saying that you were trying this case under the Constitution of the State of Texas did not mean that you were eliminating the constitution of the United States. It is a matter of due process; it is a matter of the Federal laws and the right of the Defendant to a fair and impartial trial, guaranteed to him under the Fourteenth Amendment of the United States; and this case holds, under the Four- [fol. 1134] teenth Amendment, that the person is entitled to the right to examine the jury separately and apart. I asked them to get that authority and believe he has gone to get it. It is directly in point and reversed for that reason.

The Court: I am very mindful that the United States Supreme Court some times sets aside some of our laws, but they have not yet overruled the Bill of Rights that I was speaking on this morning.

Mr. John D. Cofer: The Bill of Rights is what I had in mind, Your Honor. That the Fourteenth Amendment guarantees, says that no State shall deprive a citizen of the United States of his Bill of Rights. That's about what it means.

The Court: But they have never held, that I have any authority, that Section 10, the Bill of Rights, prevents the [fol. 1135] Defendant from having a fair trial. That is what I am getting at. If they have, I have not seen that decision.

Mr. John D. Cofer: I am not sure I follow you, Your Honor. I don't think the Bill of Rights prevents the Defendant from having a fair trial; it guarantees to him that right.

The Court: I have not seen these cases overruled by the Court of Criminal Appeals yet.

Mr. John D. Cofer: And to deny him the right of a fair trial denies him a Federal right.

We make the request now, Your Honor, urging at this early time, even before the plea of the Defendant to the indictment, we present this Federal right of due process and ask that the Court permit this examination to insure a fair and impartial trial, guaranteed not only by the constitution of Texas and the Bill of Rights of our State, but by the constitution of the United States and Amendment to the United States constitution.

[fol. 1136] The Court: Let me ask you this: Was this case concerning the preparation of the jury when being selected to try the case or preparation of the jury panel in their interrogation for testing their qualifications?

Mr. John D. Cofer: They were selecting the jury to try the case. They had selected it and the Court said that they should have selected them separately. They tried to convict him and it was reversed because the jury was not examined separately from each other.

The Court: Is that all?

Mr. McGowen: Yes, sir.

Mr. John D. Cofer: Your Honor, ordinarily, the matter of examining the jurors except in capital cases is a matter for the discretion of the Court. The question of examining

them in ordinary cases separate and apart would only arise in exceptional cases where the matter of publicity is involved. Now, as, do you know Mr. So and So, about the fact that there were three other men who were involved [fol. 1137] with the Defendant in this matter under which he is being tried today and they say yes. Then did you read what happened to them in El Paso and they say yes; then under Williams versus State, a Texas case, those men are disqualified to serve on the jury because they have obtained the information outside of the court room to which they are not entitled to receive. That is, these men got ten years and a big fine. That information is not admissible; and so if you find a juror that says yes he knew that; he is disqualified. You can't get that information from him by general questioning. He will not speak up because he figures that is improper.

And you will remember that Judge Morrison in reversing the Williams case reversed it because there were five men on the jury who had read a paper; they didn't say that they knew but they had read a paper in which paper it was shown—it was stated that in a former trial, that man had gotten a five or six-year sentence—this same defendant.

[fol. 1138] The Court: Could you give me that authority?

Mr. John D. Cofer: Yes, sir. I some times have trouble finding it. One time at Eagle Pass I had to get on the telephone and call another counsel out of town. But I think I laid it out here the other day. Williams versus State 284 SW. 2nd, the page (quits). When I was out at Pecos, I had to 'phone for it. If that is the wrong volume, Your Honor, I will find it for Your Honor by in the morning.

The Court: I have read quite a few authorities but I don't remember that case. I don't recall that I have read it.

Mr. John D. Cofer: I believe it is 284 SW. 2nd.

The Court: I will keep this until in the morning.

Court will recess until nine in the morning.

Tuesday 9:00 A.M. Oct. 23, 1962

Reporter's Note: Jury list is called by the Clerk, and [fol. 1139] by excuses; either legal or by agreement of counsel with the approval of the Court, the panel is reduced to a total number of 86.

The Court: Ladies and Gentlemen, there is one Motion pending and I want to read some authorities before I pass on it; so I am going to excuse you for one hour. You can get your time from the clock up here and report back to the court room within one hour. You are excused until then.

10:35 A. M.

The Court: Gentlemen, I am going to overrule the Motion requiring the State to elect at this time.

Mr. John D. Cofer: To which we except, Your Honor, and we will prepare a Bill.

The Court: I am going to grant the Motion, Defendant's Motion to interrogate the jury separately.

Reporter's Note: The above rulings were made while the Clerk was preparing the jury list of eighty-seven.

[fol. 1140] The Court: Ladies and Gentlemen of the Jury Panel, you will be sitting outside of the court room to be called in one at the time and interrogated by the lawyers concerning your qualifications as a juror in this case.

Do not discuss this case with any one, not even among yourselves, and don't let any one else talk to you about it. If there is any discussion around you about this case, you move on where you cannot hear it. If any one attempts to talk to you about this case at all, you tell them that you are a juror in this case and the Court has instructed you not to talk to them; and if they persist in talking or trying to talk to you, you inform the Court immediately as to who they are and the Court will take the proper action so that you will not be bothered any more with that particular party or parties.

We are going to try to accommodate you as much as we can, as we get organized here. We may be able to let those that are a good ways down the line go for a few hours and [fol. 1141] not stay close to the court room all of the time; and the bailiff will notify you from time to time what arrangements the Court can make.

Remember these instructions now; and when you are out in the hall or wherever you are, don't talk about this case or let any one talk to you. I will also instruct you not to read any more accounts of this case or listen to them on any broadcast. You should not know anything about this

case; particularly from this point on. What you have already learned, there is nothing the Court can do about it, but from this point on, you should not learn anything else about this case except what you will hear here from the witness stand, if you should become one of the twelve on this jury: After all, that is what your verdict shall be based upon, is the evidence you hear from the witness stand and be governed by the law and the Charge the Court will give you; and those two things alone are what you, as a juror, will have to decide this case on. So that is the reason I don't want you to read any more concerning this case or listen to any commentators or broadcasts or telecast about [fol. 1142] it.

So all of the jurors now report outside of the court room and remain out there until I can get organized and maybe let some of you go for awhile. Do not come back into the court room until you are called in as a juror, at any time.

Mr. John D. Cofer: Your Honor, we object to any photographs of the proceedings and the interrogation of the jurors, either by cameras or by newsreel, television or by radio—transcriptions or still pictures.

[fol. 1143]

FURTHER RULING ON DEFENDANT'S MOTION TO
BAN CAMERAS, ETC.

The Court: I am overruling the Defendant's Motion on banning the cameras, TV and radio but with this exception: From this point on television by the Court is ordered not to have any more sound; only film will be allowed from here until all of the testimony in this case is over. The same applies to radio from this point on and there will be no tape of the proceedings of the interrogation of the jury or the taking of the testimony and evidence here. That will apply to—until all of the testimony is in and any further [fol. 1144] orders of the Court will be given you at that time.

Mr. John D. Cofer: To which we except in so far as the ruling was against us.

Mr. Hume Cofer: Excuse me, Your Honor; I am not sure the record reflects our exception, to the Court's ruling as to cameras, etc.

The Court: Note their exceptions.

The Court: Are you gentlemen ready for the first juror?

Mr. Holcomb: May, we proceed, Your Honor?

The Court: Go right ahead.

[fol. 1145]

OFFERS IN EVIDENCE

Mr. McGowen: Your Honor, may we get these other pictures in, showing the modification of the booth?

Mr. John D. Cofer: I didn't see them but I don't object to them.

The Court: Let the record show these exhibits are being offered in connection with the Motion heretofore presented [fol. 1146] to the Court by the Defendant to ban cameras of all kinds and broadcasting and telecasting, etc.

Mr. McGowen: Your Honor, State's Exhibit #7, photograph taken from behind the Judge's Bench towards the rear of the court room.

State's Exhibit #8, photograph taken from the jury box towards the rear of the court room.

State's Exhibit #9, photograph taken from the witness stand towards the rear of the court room.

State's Exhibit #10, photograph taken from the jury box towards the rear of the court room.

State's Exhibit #11, photograph taken from behind the Judge's Bench towards the rear of the court room.

State's Exhibit #12, photograph taken from the witness stand towards the rear of the court room.

The Court: Your record shows the juror is not on the stand, Mrs. Mehearg?

[fol. 1147] Mrs. Mehearg: My record shows the juror retired, when you sent him out.

The Court: Mr. Holcomb wanted to make sure you show the juror not in the court room at this time.

Mr. Hume Cofer: Now, the Defendant offers Defendant's Exhibit #31, which is a photograph taken from the side of

the jury box, looking across the jury box to the Court Reporter's desk and the Court's Bench.

The Court: When was that taken?

Mr. Hume Cofer: It was taken on the 2nd of October—yesterday.

We offer it in connection with our Motion to exclude the cameras from the court room, the sound equipment and also in connection with our Motion for a continuance.

The Court: All right; and these others are offered for the same purpose as Mr. McGowen offered State's exhibits? [fol. 1148] Mr. McGowen: They depict the court room as it was this morning.

The Court: These are improvements or whatever you want to call it, made between five o'clock yesterday afternoon and nine o'clock this morning?

Mr. McGowen: Yes, sir.

Mr. Hume Cofer: Defendant's Exhibit 30, photograph taken on October 22nd of the camera booth of the front side of the camera booth, at the back of the court room.

Defendant's 29 is a photograph taken from the end of the camera booth, looking into the camera booth on October 22nd, taken at the back of the court room, looking into the camera booth, and Defendant's Exhibit 28 is a photograph taken from the same place, at the end of the camera booth, at a recess when no one in the camera booth, showing the inside of and the back side of the structure at the back of the court room. That was taken on October 22nd; and the [fol. 1149] Defendant offers Exhibits 28, 29, 30 and 31 on, and in support of both of its Motions; Motion concerning the cameras and the Motion for continuance.

The Court: Court will recess until 9:00 o'clock in the morning.

Reporter's Note: State's Exhibits 7 through 12, photographs are being forwarded as original exhibits; and Defendant's Exhibits 28 through 31, photographs, are, being forwarded as original exhibits and are a part of this Statement of Facts.

[fol. 1150]

IN THE 7TH JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

No. 16,818

STATEMENT OF FACTS—November 7, 1962

[File endorsement omitted]

[fol. 1151]

9:10 A. M. November 7, 1962

[fol. 1152] Mr. John D. Cofer: Your Honor, I understand that we have just two arguments, State will have two and the defense will have two; and Mr. Hume Cofer will make our first argument and I will make our second.

The Court: With just four of you, will two hours to the side be satisfactory? An hour to each?

OBJECTIONS TO TELEVISION AND PHOTOGRAPHS DURING
ARGUMENTS, ETC., AND COURT'S RULING THEREON

Mr. John D. Cofer: Yes, Your Honor, two hours will be satisfactory.

Now, Your Honor, we want to again object to television and photographs in the court room while the jury is sitting in the box.

We object to any pictures being taken while the argument is going on or while the jury is in the box.

We object to any television, live or simply pictures, and in the event the Court adheres to his announcement that has been made, we want to except to it. Then we then want to make a special request, that the arguments for the two lawyers for the Defense not be photographed, or not be televised, live or not be photographed, and that no pictures [fol. 1153] be permitted to be taken while Mr. Hume Cofer and myself are making our arguments.

The Court: Overrule the first request, but now the last request is going to be granted, and I now order that while Mr. Hume Cofer and while Mr. John Cofer are addressing the jury, that the cameras not be on them and that all

sound be turned off; and there will be no press photographers' pictures made of either of those gentlemen while they are addressing the jury.

Otherwise, you may proceed, but for those two, follow that order of the Court.

Mr. John D. Cofer: Now, we except to the part of the Court's Order which overruled our first Motion.

The Court: Are you ready now for the jury, Gentlemen?

Mr. McGowen: Yes, sir.

The Court: Bring the jury in. (Prior to jury coming in)

Now, all the photographers, any pictures that you make, [fol. 1154] stay back at the back, in keeping with my order. It is all right to be seated where you are, but do not take any pictures from that position at all during the discussion of either side—from that position there.

If you have any pictures to make during the time I have told you that you could make pictures, go back to the back.

[fol. 1155] APPROVAL OF JUDGE PRESIDING (omitted in printing).

[fol. 1156]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

BILLIE SOL ESTES, Appellant,

v.

THE STATE OF TEXAS, Appellee.

Appeal from Smith County

OPINION—January 15, 1964

[fol. 1157] By bills of exception Nos. 5 and 6, appellant complains of the court's action in permitting live television

[fol. 1158] of the trial and insists that the manner in which he was subjected to such public dissemination of his trial throughout the nation, both in and out of the presence of the jury, denied him due process of law under the Constitution of this State and of the United States. It is contended that such action by the court required appellant to go to trial with the counsel of his choice, in violation of the ethical standards defined by Canon 35 of the American Bar Association, which seriously hampered counsel in the defense of appellant and denied to him full and adequate representation to which he was entitled under due process.

The bills of exception show that the case was first set for trial for September 24, 1962. On September 24 and 25, a hearing was held by the court on two motions filed by appellant. One motion was that no telecasting of the trial be permitted and the other was for a continuance. At the hearing, the court permitted live telecasting of the proceedings.

At the conclusion of the hearing, the court overruled appellant's motion that the trial not be telecast but granted the motion for continuance and reset the trial for October 22, 1962. On October 22, 1962, the case proceeded to trial on its merits.

Prior to the trial a booth was constructed and placed in the rear of the courtroom, painted the same color as the courtroom, with a small opening across the top for the use of cameras. During the trial, the court permitted telecasting of the proceedings by ABC, NBC, and CBS networks [fol. 1159] and KRLD television in Tyler, from the booth in the rear of the courtroom. Such telecasting was on film, without sound. The court did not permit telecasting in the hallway leading into the courtroom or on the second floor of the courthouse, where the courtroom was situated, in order that appellant and his attorneys would not be molested or harrassed in approaching and leaving the courtroom. No live telecasting of the proceedings was permitted by the court except the arguments of state's counsel and the return of the jury's verdict and its acceptance by the court. The arguments of appellant's counsel were not telecast, as requested by them. The bills certify that no juror or witness requested that he not be televised.

Under the facts certified, we fail to perceive any injury to the appellant as a result of the telecasting of the proceedings.

Appellant did not testify or call any witnesses, so it can not be said that he or his witnesses were burdened by the presence of cameras. There is no intimation in the record that any juror or witness was embarrassed or humiliated by reason of the telecast.

In *Ray v. State*, 221 S. W. 2d 249, this court refused to speculate and presume injury to an accused where photographers took pictures of the defendant and the jury while the judge was out of the courtroom. [fol. 1160] In *Farrar v. State*, 277 S. W. 2d 114, this court refused to reverse a conviction because photographs were made of the appellant, his counsel, and the jury during the trial, in the absence of an objection *and showing of injury to appellant*.

The manner in which the trial judge permitted and controlled telecasting of the instant trial was well within the supervision and control of such coverage granted to him under Canon XXVIII of the Canons of Judicial Ethics since approved by the Judicial Section of the State Bar of Texas.

The contention that appellant was denied full and adequate representation, because of his counsel's belief in Canon 35 of the American Bar Association barring photographs in the courtroom or broadcasting or telecasting court proceedings, is not borne out by the record. Of the many cases coming to this court, we know of no case where the accused received better or more efficient representation than did appellant in the present case.

Dice, J.

[fol. 1161]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

AUSTIN, TEXAS

No. 36,086

BILLIE SOL ESTES, Appellant,

vs.

THE STATE OF TEXAS, Appellee.

Appeal from Smith County

JUDGMENT—January 15, 1964

Opinion by Judge Dice.

Concurring Opinion Judge Morrison.

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

[fol. 1162]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

[Title omitted]

Appeal from the 7th Judicial District Court of Smith County, Texas.

APPELLANT'S MOTION FOR REHEARING—

Filed January 30, 1964

[File endorsement omitted]

J. Byron Saunders of Tyler, Texas, John P. Dennison of Pecos, Texas, Cofer, Cofer & Hearne of Austin, Texas, Attorneys for Appellant.

[fol. 1163]

VIII.

1. The Court of Criminal Appeals errs in sustaining live television of the trial of defendant, over his objection, as reflected by his Bills of Exceptions No. 5 and 6; and in violation of Canon 35, and of accepted standards of fair trial and judicial procedure, and of Judicial Ethics, as promulgated by the American Bar Association, and in requiring him and his counsel, over their objections, to submit to trial before live television, under the facts and circumstances of this case, and by so doing denying the defendant a fair trial, and equal protection of law, and due process of law under the XIV Amendment to the Constitution of the United States.

2. The Court of Criminal Appeals errs, in an "all out treatment" publicity case such as defendant's, in requiring him, over his objections, to submit to any procedural technique which does not in some reasonable way contribute to the determination of his innocence or guilt, and which is calculated to any extent to interfering with a fair trial, and to commercialize and exploit him and the circumstances under which he is held to answer before the bar of Justice, and to so hold, denies the defendant equal pro-

tection of the law, and due process of law under the XIV Amendment to the Constitution of the United States.

3. The Court of Criminal Appeals errs in sustaining the trial court's permission for live telecast of the defendant's trial, over his objections, and in holding that the defendant had no rights, if the State's Counsel did not object, and if "no juror or witness" objected; because the purpose of defendant's trial was not to please and put on display the State's attorneys, the State's witnesses, and the members of the jury; and the trial as conducted denied defendant a fair trial, and equal protection of the law, and due process of law under the XIV Amendment to the Constitution of the United States.

4. The Court of Criminal Appeals errs in upholding live television of defendant's trial, under the provisions of Canon XXVIII of the Canons of Judicial Ethics, approved [fol. 1164] since defendant's trial by the Judicial Section of the State Bar of Texas, and says that the enforcement of such rule by the integrated Bar of Texas, a State agency, and by the District Court of Smith County, Texas, and by this Court, is unreasonable and arbitrary, and said State Canon is discriminatory and is not uniform in its application; in that it leaves to the trial court the determination, without defendant's consent, in which case a defendant shall be subjected to television exploitation of his trial, and as applied in this case, denies this defendant the rights given to a less "news-worthy" defendant; and denied him the equal protection of the law, and due process of law under the XIV Amendment to the Constitution of the United States.

5. The Court of Criminal Appeals errs in applying Canon XXVIII of the Canons of Judicial Ethics of the Judicial Section of the Integrated Bar of Texas, a state agency, because in permitting each judge to determine whether a defendant's trial shall be telecast, and in this case permitting the trial judge to enforce such a rule against this defendant, there is no uniform standard of reasonableness established for the application of such canon and rule, nor is it provided in said canon and rule

that no judge shall administer the same, or exercise his discretion in such a way, as to unreasonably interfere with the defendant, and his counsel in defending his case, or with his obtaining a fair trial, or discriminate against a particular defendant; and said Canon as written, is not susceptible of uniform, fair and impartial application, and its application by this Court, and by the District Judge, and by the Judicial Section of the Integrated Bar of Texas, and sustained by this Court, denies defendant the equal protection of the law, and due process of law under the XIV Amendment to the Constitution of the United States.

This appellant does not wish to further argue the proposition as to live television as an arm to the Judicial process, and the fair and impartial administration of Justice. It has been fully argued in Volume I, paragraph VI of his Brief on Original Submission. Nothing has changed the situation since that brief was written, except for two things:

[fol. 1165] (1) The trial judge has, *ex post factorially*, secured the official sanction (approval) of his procedure, extra-judicially, by his fellow Judges, in the Judicial Section, of the State Bar of Texas. There is no record of any defendant or practicing lawyer participating.

(2) Then, more recently, the application of Texas Canon XXVIII, of Judicial Ethics, by the administrative officers of the Judicial branch of our State government, has resulted in television's, and news-happy political officials', greatest, though hardly their finest, hour. As cameras whirled, and public officers "mugged", a man accused of murder in this State, as millions watched, was publicly lynched, in vindication of our Texas Judicial Section's guarantee of the Public's right to look, see, and witness the immolation of their fellow man.

"Lee Harvey Oswald and The Law"—"Could Lee Harvey Oswald Have Obtained a Fair Trial?" My eminent opposing Counsel, the Attorney General for this Court, appeared recently upon a nationwide hook-up and advanced the doctrine, and ably upheld the position, to be applied to famous crimes, and to those "whom there is no doubt of their guilt"; *that those so accused are entitled to no fairer trial than they can get.*

This rule of Justice, we suppose is for "some noted culprit, on whom the sentence of a legal tribunal had but confirmed the verdict of public sentiment". Hawthorne, *"The Scarlet Letter"*, Chap. II, p. 49, Centenary Edition.

No one can know whether "Lee Harvey Oswald" could have gotten a fair trial. He did not get one, and now cannot; nor will any presumption of innocence hallow his Eternity. As lawyers, our answer is a simple one.

Lee Harvey Oswald could have gotten a fair trial, because our Federal and State Constitutions have guaranteed him that, and our confidence, as lawyers at the bar, is that this Court, and the Supreme Court, would have seen that he did. That is not the question!

[fol. 1166] The question is:

Could the State of Texas, according to the accused equal protection of the law and due process of law; in light of what occurred, have secured a conviction of Lee Harvey Oswald?

Do we who are officers of the Court really want to abandon such sensationalism?

Against the great concrete interests in the extravaganza of the "flood-lights", the press, the television industry, public relation experts, publicity-seeking officers, and attorneys for prosecution and defense, stand only the rights of the lone defendant seeking a fair trial, and the state's interest in the dignity and impartiality of its courts.

Canon 35 of the American Bar Association, is a uniform rule, applied without discrimination. Only two States, we are told, do not adhere to it.

It is of some significance that the "saga of Lee Harvey Oswald" was to end in one of those States. It could have only occurred in a State where public officers made arrests and arraignments under compact with news media, and men are tried and condemned under Treaty between Judge and "hucksters".

[fol. 1167]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

BILLIE SOL ESTES, Appellant,

v.

THE STATE OF TEXAS, Appellee.

Appeal from Smith County

OPINION ON APPELLANT'S MOTION FOR REHEARING—
March 11, 1964

[fol. 1168] The appellant forcefully argues in favor of Canon 35, Canons of Judicial Ethics of the American Bar Association, and against the view that the supervision and control of broadcasting or televising of court proceedings shall be left to the trial judge who has the inherent power to exclude or control such coverage.

We are not called upon to pass upon the merits of Canon 35. It is not binding upon the courts of this state.

We remain convinced that the coverage of appellant's trial in the manner set out in our original opinion was not a violation of due process and equal protection of law or other constitutional safeguard.

Woodley, Presiding Judge

[fol. 1169]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

[Title omitted]

Appeal from Smith County

MINUTE ENTRY OF ORDER OVERRULING MOTION
FOR REHEARING—March 11, 1964

This cause came on to be heard on Appellant's Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

[fol. 1170]

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 36,086

[Title omitted]

Appeal from Smith County

MINUTE ENTRY OF ORDER OVERRULING SECOND MOTION
FOR REHEARING—April 15, 1964

No Written Opinion

This cause came on to be heard on Appellant's Second Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

[fol. 1171] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 1172]

SUPREME COURT OF THE UNITED STATES

No. 256—October Term, 1964

BILLIE SOL ESTES, Petitioner,

v.

TEXAS.

ORDER ALLOWING CERTIORARI—December 7, 1964

The petition herein for a writ of certiorari to the Court of Criminal Appeals of the State of Texas is granted limited to Question 2 presented by the petition which reads as follows:

"Whether the action of the trial court, over petitioner's continued objection, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas."

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

256

BILLIE SOL ESTES, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS
OF TEXAS

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1963

No. _____

BILLIE SOL ESTES, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS
OF TEXAS

Petitioner, Billie Sol Estes, prays that a writ of certiorari issue to review the judgment of The Court of Criminal Appeals of Texas entered in the above entitled case, and the denial, on April 15, 1964, of petitioner's second motion for rehearing.

OPINIONS BELOW

The opinions of the court below are not yet reported and are printed herein in Appendix A. The

original opinions of the court of January 15, 1964, affirming petitioner's conviction, are printed at pp. 1a-35a, *infra*; the court's opinion of March 11, 1964, overruling the motion for rehearing, is printed at pp. 36a-42a, *infra*. Petitioner's second motion for rehearing was denied April 15, 1964, without written opinion (see Appendix A, p. 43a-44a, *infra*), but at the same time the court entered an order correcting its opinion on rehearing as to a misstatement of the record, printed at p 43a, *infra*.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered January 15, 1964. Petitioner's second motion for rehearing was denied April 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether, in this case of all out publicity treatment, the construction by the Texas Court of Criminal Appeals of the Texas procedural statutes so as to deny the petitioner prior to his indictment, and afterwards on motion, the opportunity to examine the members of the grand jury for bias and prejudice against him because of such publicity, denied the petitioner due process of law and equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

*2. Whether the action of the trial court, over petitioner's continued objection, denied him due pro-

cess of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas.

3. Whether the trial court denied petitioner due process of law under the Fourteenth Amendment of the United States Constitution in overruling his motion for continuance and first motion for change of venue, and in requiring petitioner to go to trial, in this all out publicity case, before a trial jury whose members had received through the news media damaging and prejudicial evidence which the trial court held and certified was not admissible upon the trial, at least three of the jurors having preconceived opinions that petitioner was guilty.

4. Whether the trial court and The Court of Criminal Appeals denied petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States under the First Count of the Indictment, for swindling, when there was no evidence to support the offense charged in the indictment in said count.

-4-

STATUTES INVOLVED

The statutes involved are:

Articles 339, 358, 361 and 374, Revised Code of Criminal Procedure of Texas 1925 (Vernon's Annotated Code of Criminal Procedure).

Article 1, Sec. 10, of the Constitution of Texas.

Articles 560 and 566, Revised Code of Criminal Procedure of Texas 1925 (Vernon's Annotated Code of Criminal Procedure).

Texas Penal Code, Article 1411.

Texas Penal Code, Article 1418.

Texas Penal Code, Article 1545.

Canon 35 of the Canons of Judicial Ethics of the American Bar Association.

Canon 28 of the Canons of Judicial Ethics, approved by the Integrated State Bar of Texas (a State Agency).

Portion of Rules of the Court of Criminal Appeals.

See Appendix B, infra.

STATEMENT OF THE CASE

The trial and conviction of petitioner below were upon an indictment for swindling, under Chapter 16, Title 17, of the Texas Penal Code, as alleged by the First Count. (R. IV, 1-18).¹ The indictment contained four counts (for swindling, theft, theft by a bailee, and embezzlement). (First count printed in Appendix C, *infra* p. 53a-60a) Count IV was abandoned. Counts I, II and III were submitted to the jury with instructions that it could convict only upon *one* of the three counts. (R. IV, 151)..

The First Count, upon which petitioner was convicted, charged that petitioner, by means of false pretenses and devices and fraudulent representa-

¹ The record filed in the Supreme Court is in several parts because of the hearings in the various courts, and the preliminary hearings, and is referred to as follows:

"R. I, _____" refers to proceedings held in Reeves County, Texas, prior to change of venue.

"R. II, _____" refers to proceedings held in Tyler, in Smith County, Texas, on a preliminary hearing.

"R. III, _____" refers to volumes of preliminary proceedings, at time of the trial, and jury voir dire examinations.

"R. IV, _____" refers to what in Texas is called the Transcript, which contains the pleadings, motions and court orders.

"R. V, _____" refers to the transcript of the evidence upon the trial, called in Texas, the Statement of Facts.

"R. VI, _____" refers to the proceedings in the Court of Criminal Appeals.

Original Exhibits are filed which have been sent up upon order of the trial court, and are referred to by description.

Copies of the appellant's briefs in the Court of Criminal Appeals are filed, together with an Exhibit containing particular news items referred to in the jury voir dire and briefs.

tions, induced one T. J. Wilson to sign a written instrument and to deliver the written instrument to petitioner, which instrument was valued at more than \$50.00 and was the property of Wilson, and that petitioner acquired the instrument with the intent to appropriate the same to his own use and of destroying the right of Wilson who was entitled to same (R. IV, 2-8). The written instrument was set out *in haec verba* (R. IV, 2-6). The false pretenses alleged to have induced the delivery of the written instrument were (1) that Wilson by signing and executing said instrument was purchasing certain ammonia fertilizing tanks and equipment described in the instrument; and (2) that the property, as listed, secured said instrument of writing and was security thereon, which representations were alleged to have been knowingly false (R. IV, 7).

The indictment in this case was returned by the grand jury of Reeves County, Texas, and filed July 20, 1962; and transferred on the order of the trial court, over the petitioner's protest (See corrected opinion on Second Motion for Rehearing, Appendix A, *infra* p. 43a) to the City of Tyler, in Smith County, Texas, on July 23, 1962; and filed in Tyler on July 30, 1964 (R. IV, 19; Bystander's Bill of Exceptions No. 3 R. IV, 916-925).

Prior to the indictment in the instant case, petitioner had been indicted in Reeves County, Texas, in Cause No. 2660, together with seven other cases (Defendant's Bystander's Bill of Exceptions No. 1, R. IV, 899), and when these previous cases were called June 25, 1962, in Reeves County, Texas, de-

fendant made a conditional announcement of ready. The State elected to try Cause No. 2660, State v. Estes, involving Thomas H. Bell. A jury venire was empaneled and sworn. Thirty-two jurors were qualified by the Court after two days of interrogation. The list was scratched by the parties, and defendant asked permission to withdraw his announcement of ready, and moved the Court to pass the case for a later trial in Reeves County, Texas (Bystander's Bill No. 1, R. IV, 900).

The Reeves County District Court discharged the jury and passed the case until July 23, 1962, and announced his tentative decision to transfer the case to Smith County, Texas (R. IV, 909-910).

After the Reeves County Court decided not to proceed to trial in Reeves County, and the case was passed until July 25th, 1962 (at which future date the Court had announced his intention to transfer the case to Smith County), the defendant, on June 27, 1962, stated in open court that he had been informed that the grand jury would convene on July 10th, 1962, to consider additional indictments against him, and defendant asked for an opportunity to interrogate said grand jurors for prejudice or bias, in view of the tremendous amount of publicity since his first arrest.

The proceedings in this connection are set out in Defendant's Bystander's Bill No. 1 (R. IV, 911-914). Defendant offered in support of his request some 10 volumes of newspaper publicity, which are

part of the original Exhibits filed in the Supreme Court.²

Defendant was not permitted to interrogate the grand jury, and he was indicted in this case, filed July 20th, 1962 (R. IV, 19).

Before this case was transferred to Smith County, defendant, in Reeves County on July 23, 1962, moved to quash and dismiss the indictment because he was denied the opportunity to interrogate the grand jury for bias and prejudice, which was overruled (R. IV, 375-376).

On the same day, three days after the indictment was filed, the court on its own motion, over defendant's strenuous objection,³ ordered the case moved 500 miles across the State to Smith County, where it was eventually tried.

This case was first set and called for trial in Tyler, in Smith County, Texas, on September 24th.

² These original volumes are part of the Record in the State Court, and also in a Federal Case in The Western District of Texas, at El Paso. They are now (at the time of writing this Petition) part of the Record in Cause Number 20,519, *Estes v. United States*, pending on appeal in the United States Court of Appeals for the Fifth Circuit, and will be made available by that Court to the Supreme Court.

³ Defendant, before the removal, offered evidence of the particular existence of prejudice in Smith County. Three witnesses from Smith County testified defendant could not get a fair trial in that County. No evidence was offered by the State, nor by the Court, supporting the move from Reeves County to Smith County. (Bystander's Bill of Exception No. 3. R. IV, 916; R. I. Proceedings on Change of Venue from Reeves to Smith County).

1962. Prior to the call of the case on that date, defendant's counsel had received notice through the press that the court upon the trial of the case intended to permit live television of the trial, and defendant's counsel notified the court that defendant desired to take up through his counsel certain matters before defendant made his appearance at the courthouse and in the courtroom (R. IV, 537).

The proceedings involving the live television of the Estes trial are shown by Defendant's Bill of Exceptions No. 5 (R. IV, 537), and by the photographs which are part of the record, and by the original television tape of a two hour broadcast the night of September 24, 1962.*

A fair and restrained description of what occurred in Tyler was reported by The New York Times, September 25th, 1962, as follows:

"A television motor van, big as an intercontinental bus, was parked outside the courthouse and

* This tape was identified in the State Court, and made part of the Record. (R. III, 47) It was shown to the Texas Court of Criminal Appeals. Special equipment is required to show it, but attorneys for the petitioner, at the Supreme Court's request, can arrange through the Dallas broadcasting station and a Washington station for a showing of this tape.

The Broadcast of the proceedings live and upon the tape was sponsored by "Sprite" (a soft drink) (R. III, 50), Shedd Bartusch, Campbell's Soup (R. III, 51), Simonize, Bean's Eye Drops (R. III, 53), Icecapades, Rayco Seat Covers, (R. III, 54), Home Furniture, Interstate Theater, Guest Beard, Murine, Readers Digest, and the Dallas Morning News (R. III, 55-56). There was estimated to be 100,000 viewers in the Dallas area (which includes Smith County), with a potential of 760,000 sets (R. III, 58).

the second floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four marked cameras were aligned just outside the gates.

"A microphone stuck its 12 inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor." (See A.B.A. Report by Special Committee on Proposed Revision of Canon 35, p. 6).

The case went to trial on October 22nd, 1962, and the condition was "somewhat corrected", as shown by Bill of Exceptions No. 5 (R. IV, 546-549).

The trial court overruled defendant's objections to the live television as shown by Defendant's Bill of Exceptions No. 5 (R. IV, 537-549 and Bill of Exceptions No. 6 (R. IV, 551-555).

At one point, in response to defendant's objection, the trial court made his position clear on due process. The Court said (R. III, 88):

"I took an oath to uphold this Constitution (Texas); not the Federal Constitution."

Prior to the commencement of the trial, after the thirty-two jurors had been qualified by the Court,

¹ However, Article 16, Section 1 of the Texas Constitution prescribes the Judge's Oath, part of which reads: "and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and this State."

defendant sought to have the case continued, or to have the venire excused, to have the venue changed from Smith County. (Bill of Exceptions No. 23; R. IV, 780-871; R. III, Jury Voir Dire, for full testimony of thirty-two veniremen).

Petitioner did not take the stand and testify. (Bill of Exceptions 23, R. IV, 862) Nine of the jurors, all challenged by defendant for cause, who served on the trial jury were Hamilton, Robertson, Gordon, Holifield, Florey, Mallory, Brown, Adkins, and Nutt (R. IV, 862), and each of the nine received through news media inadmissible testimony. The trial court certified that the evidence set out in the Bill of Exceptions was received by these nine jurors outside of the courtroom and that "such information was not admissible in evidence" (R. IV, 862). Bill of Exceptions No. 23 (R. IV, 862-869) summarizes the inadmissible evidence received by each of said nine jurors, and then states: "All of the information received by the jurors, respectively, outside of the courtroom went with them into the jury room during their deliberations".

Three of the above jurors who served on the jury, Robertson, Mallory, and Nutt, before they were taken on the jury stated they had formed opinions respectively that defendant was guilty (Robertson testimony, R. IV, 796-797; the trial court certified that Robertson had an opinion it would require evidence to remove; Mallory testimony, R. IV, 866-867; Nutt testimony, R. IV, 869, R. III, 456).

Defendant exhausted all of his peremptory challenges (R. IV, 743).

The jury had made up its mind on the case when it retired to the jury room.*

The motions to continue, to dismiss the jury, or to change the venue were overruled, and defendant was put to trial before the foregoing jury.

All of the Federal questions were raised in the lower court, and by Briefs, Motion for Rehearing, and Second Motion for Rehearing in the Texas Court of Criminal Appeals; and all were decided against petitioner by said Court.

The stay of mandate was granted by the Court of Criminal Appeals on Motion directing attention to the Federal Questions (R. VI).

REASONS FOR GRANTING THE WRIT

1. The Denial by the Texas Court of Petitioner's Right to an Unbiased and Unprejudiced Grand Jury.

The *Texas Constitution*, Article 1, Sec. 10, guarantees to every person tried for a felony in Texas that he be indicted by a grand jury.

* In a very few minutes, (even though the jury had the Court's charge, R. IV, 879) "before the parties had time to complete the assembling of the Exhibits to send to the jury for its deliberations, the jury sent in a note to the Court inquiring whether the jury could convict defendant on all three counts" (R. IV, 878).

† As to petit jury, the Constitution uses the express words "impartial jury". As to the grand jury, the same article says "indictment of a grand jury" (See, Art. 1, Sec. 10, Appendix B, *infra*, p. 45a).

Beck v. The State of Washington, 369 U.S. 541, had this question before the Supreme Court, but the Court did not decide it, because the majority of the Court was of the opinion that the petitioner, Beck, had not been denied a fair and impartial grand jury by the State of Washington.

Justice Clark, writing the opinion for the Court, said:

"It may be that the Due Process Clause of the Fourteenth Amendment requires the State . . . to furnish an unbiased grand jury." (citing a number of cases)

"But we find that it is not necessary for us to determine this question (right in a State court to an unbiased grand jury); for even if due process would require a State to furnish an unbiased body once it resorted to grand jury procedure—a question upon which we do not remotely intimate any view—we have concluded Washington, so far as is shown by the record, did so in this case."

It is significant that all the cases cited in the Court's opinion for comparison *Lawn v. United States*, 355 U.S. 339, *Costello v. United States*, 350 U.S. 359, and *Hoffman v. United States*, 341 U.S. 478, 485, point to the basic requirement of a fair and impartial grand jury as part of due process.

That this question was reserved, and "explicitly left open" in *Beck* is shown by the dissenting opinion of Justice Harlan and Justice Clark in *Wood v. Georgia*, 370 U.S. 375, 398:

In its original opinion the Texas Court of Criminal Appeals specifically refused to give effect to *Beck v. Washington*, and citing the case says:

"... the Supreme Court did not hold that under the due process clause of the Fourteenth Amendment a state was required to furnish an accused an unbiased grand jury but specifically stated that such was a question 'upon which we do not remotely intimate any view . . .'" (Appendix A, *infra*, p. 7a-8a).

On Rehearing the Texas Court of Criminal Appeals, met the issue squarely, and said:

"Our holding is that the appellant was denied no constitutional or statutory right by the court's refusal to permit him to interrogate members of said grand jury for the purpose of ascertaining bias, prejudice or preconceived opinion as to the appellant's guilt and exercising challenges". (Appendix A, p. 38a)

The Court of Criminal Appeals in its opinion says in Texas the right to challenge the grand jury array, or individual members, is confined to Articles 339, 358, 361, and 374 of the Texas Code of Criminal Procedure, and does not include the constitutional ground of "bias and prejudice". (Opinion, Appendix A. p. 7a; Statutes, Appendix B, p. 45a-52a).

The Texas Court by its decisions, despite the above statutes, would permit a challenge upon constitutional grounds for "bias and prejudice"; to a negro (*Davis v. Texas*, 374 S.W. 2d 242, decided

the same day as the *Estes* case; *Carter v. Texas*, (1898) 39 Tex. Crim. Rep. 345, 48 S.W. 508); to a person of Mexican descent (*Hernandez v. Texas*, 347 U.S. 475); to a member of the Catholic faith *Juarez v. Texas*, 102 Tex. Cr. Rep. 297, 277 S.W. 1091, arising during the Klu Klux era of the "twenties");^{*} but not to petitioner who belongs to no special group.

The right to challenge for bias and prejudice, or for any reasons, presupposes the opportunity to make the challenge. See *Crowley v. United States*, 194 U.S. 461, 469, 470; also Mr. Justice Clark in *Coleman v. Alabama*, ____ U.S. ____, 12 L. ed 2d 190, 193 (headnote 2).

The opportunity is directly presented in this case for the Supreme Court to decide this question not heretofore passed on, but left open in *Beck*. And the question arises under highly prejudicial and aggravated circumstances, which this Court should act to correct.

2. The Trial Court's Requiring Petitioner Over His Objections to Submit to Live Television of His Trial.

It is the petitioner's position that the purpose of his trial was to determine his innocence or his guilt.

^{*} The more recent case of *McClellan v. Texas*, 373 S.W. 2d 674, where the right to challenge for bias and prejudice seems to be conceded, can in no way be reconciled with this *Estes* case. The two cases were finally decided approximately the same dates.

It would seem an uncomplicated part of due process *that he not be needlessly humiliated and commercially exhibited, over his objection, and required to submit to any trial procedure or technic which did not bear some fair and reasonable relation to the ascertainment of his innocence or guilt.*

If the edification of the public may be said to be an additional legitimate function of the trial of an accused, this worthy purpose (having no bearing upon determination of innocence or guilt) is certainly seriously brought in question when the interest of the television media is confined to such cases as Estes, Oswald and Ruby; to be exploited in the sale of soft drinks, soaps and soup. (See Barnett, "The Case of the Month", 49 A.B.A.J., p. 548).

A defendant in a criminal case is entitled to be tried by the law of the land, and criminal procedure is a vital part of such law for the protection of an accused. Most of these rules are fixed by statutes or court rules. No rule requires a defendant to submit to photography, television, and radio broadcast of his trial.

* This question has not been passed upon by the Supreme Court; nor has the Supreme Court determined the extent to which A.B.A. Canon 35, and Federal Rules of Crim. Proc., Rule 53, (18 U.S.C.A., p. 499) give "expression to a standard which should govern the conduct of judicial proceedings". See, H. Barron, *Federal Practice and Procedure*, Rule Edition, p. 878; Orfield, 22 Tex. L.R. 194, 222-3; also, Report of the Special Committee on Cooperation between Press, Radio, and Bar, etc. (1937) 62 A.B.A. Ref. 851, 862-865; Galloway, "The Legislative Process in Congress", p. 234.

Chief Justice Hughes wrote, in *Brown v. Mississippi*, 297 U.S. 278: "The State is free to regulate the procedure of its courts in accordance with its own conceptions of policy. . . . (but) it does not follow that it may substitute trial by ordeal." Cf. *White v. Texas*, 310 U.S. 530.

In *Rideau v. Louisiana*, 373 U.S. 723, 726, Mr. Justice Stewart, writing for the Court, in reversing because of television of pretrial examination of the defendant, said:

"Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights."

Rideau was reversed because of a potential audience in Calcasieu Parish of 150,000, and approximately 24,000 saw and heard the broadcast. In our case the total potential was 760,000, and approximately 100,000 persons viewed the broadcast.

A courtroom proceeding should be conducted according to the standards recognized by the legal and judicial profession. The American Bar Association's Special Committee on Canon 35 has only recently recommended to the House of Delegates the retention of Canon 35. It has been said by a leader of the American Bar, and one time President of the Association, Hon. Whitney Seymore, of New York, that the exhibits and record in this *Estes* case were a strong influence in New Orleans in the Committee's decision. The House of Delegates of the A.B.A. on February 5, 1963, voted to adopt the recommen-

dation of the Committee for retention of Canon 35. See Editorial, "Comments on the Ruby Trial," 50 A.B.A.J., p. 454-455; *McGuigan*, "Crime Reporting", 50 A.B.A.J., p. 445.

Chief Justice Warren, in connection with the consideration of the subject by the Judicial Conference of the United States, in a letter to Chairman John H. Yauch, of the Special Committee on Canon 35, stated that "the members of the Conference were unanimous in their belief that subjecting the courts to such practices (the taking of pictures during judicial proceedings) is inimical to the administration of justice".¹⁰

Mr. Justice Douglas, in 1960, speaking at the University of New Hampshire, in discussing the effect of radio and television in a trial said:

"The trial is as much of a spectacle as if it were transferred to Yankee Stadium or the Roman Coliseum. When televised, it is held in every home across the land. No civilization ever witnessed such a spectacle. The presence and participation of a vast unseen audience creates a strained and tense atmosphere that will not be conducive to the quiet search for truth."

In a recent address before the American Society of Newspaper Editors, Mr. Justice Goldberg recommended that the newspaper code of ethics be refurbished to include standards for reporting crime.

¹⁰ Report of Special Committee, p. 6.

The most aggravated television of the Estes trial occurred when the defendant first appeared in the Tyler Court, and upon the application for postponement because of local publicity, which motion was overruled by the trial judge. A defendant is entitled to be free from the effects of television in the Courtroom in hearing before the judge, as before a jury.

"One is deprived of due process of law when he is tried in an environment so permeated with hostility that judicial proceedings can be 'but a hollow formality'", Justice Clark's dissent in *Rideau v. Louisiana*, 373 U.S. 723, 729.

The Texas Court of Criminal Appeals sustains its position by refusing to honor Canon 35, but announces its decision is in line with Canon 28, approved by the Judicial Section of the State Bar of Texas, September 27, 1963 (27 Tex. Bar Journal, pp. 94-95; Appendix B *infra* pp. 56a-57a), adopted almost a year after this Estes trial.

Texas Canon 28 permits a witness to object to having his testimony televised, but does not permit a defendant to object to such proceedings.

Professor Paulsen (of Columbia) and Kadish (of Michigan), in their text, "Criminal Law and Its Processes", 1962, Sec. C, Ch. 12, p. 1076 point out some of the reasons in support of Canon 35:

"(a) radio and television will result in 'playing to the audience' by judges, lawyers, witnesses and

jurors; (b) the 'right of privacy' of witnesses and parties will be disturbed; (c) the accused may be prejudiced by the heightened public clamor resulting from radio and television coverage; (d) the media may distort the trial by broadcasting only the sensational portions of the proceedings or selections made from a biased point of view."

The most recent application of Texas Canon 28, of Judicial Ethics, by the administrative officers of the Judicial branch of the Texas State government, has resulted in television's, and news-happy political officials', greatest, though hardly their finest, hour. As cameras whirled, and public officers "mugged", a man accused of murder in that State was publicly lynched as millions watched, in vindication of our Texas Judicial Section's guarantee of the Public's right to look, see, and witness the immolation of their fellow man.

"Lee Harvey Oswald and The Law"—"Could Lee Harvey Oswald Have Obtained a Fair Trial?". My eminent opposing Counsel, the Attorney General for the Court of Criminal Appeals, appeared recently upon a nation-wide hook-up and advanced the doctrine, and ably upheld the position, to be applied to famous crimes, and to these as to "whom there is no doubt of their guilt"; *that those so accused are entitled to no fairer trial than they can get.*

This rule of Justice, we suppose, is for "some noted culprit, on whom the sentence of a legal tribunal had but confirmed the verdict of public sentiment".

7

Hawthorne, "The Scarlet Letter", Chap. II, p. 49, Centenary Edition.

No one can know whether "Lee Harvey Oswald" could have gotten a fair trial. He did not get one, and now cannot; nor will any presumption of innocence hallow his Eternity. As lawyers, our answer is a simple one.

Lee Harvey Oswald could have gotten a fair trial, because our Federal and State Constitutions have guaranteed him that, and our confidence, as lawyers at the bar, is that the Supreme Court would have seen that he did. That is not the question.

The question is:

Could the State of Texas, according to the accused equal protection of the law and due process of law, in light of what occurred, have secured a conviction of Lee Harvey Oswald?

Do we who are officers of the Court really want to abandon such sensationalism?

Against the great concrete interests in the extravagance of the "flood-lights", the press, the television industry, public relations experts, publicity-seeking officers, and attorneys for prosecution and defense, stand only the rights of the lone defendant seeking a fair trial, and the state's interest in the dignity and impartiality of its courts.

— Canon 35 of the American Bar Association is a uniform rule, applied without discrimination. Only

two States, we are told, do not adhere to it. (Colorado and Texas).

It is of some significance that the "saga of Lee Harvey Oswald" was to end in one of those States. It could have occurred only in a State where public officers made arrests and arraignments under compact with news media, and men are tried and condemned under treaty between judge and "hucksters".

3. Petitioner was tried by petit jurors who received from the news media evidence which the trial court held was inadmissible upon the trial, and evidence which the jurors took with them to the jury room during their deliberations. Three of the jurors on voir dire expressed opinions that the defendant was guilty.

This case is ruled by *Irvin v. Dowd*, (1961), 366 U.S. 717; *Janko v. United States*, (1961), 366 U.S. 716; *Marshall v. United States* (1959), 360 U.S. 310; *Shepherd v. Florida*, (1957), 341 U.S. 50; *Bloeth v. Denno, Warden*, (1963, 2d Cir., en banc, 5 to 3) 313 F. 2d 364, cert. den. 372 U.S. 978; and by the more recent case of *Rideau v. Louisiana*, 373 U.S. 723.

Until the decision in this *Estes* case, the Texas Court of Criminal Appeals had announced and accepted the rule in the above cases, by its decision in

Williams v. State, 162 Tex. Cr. Rep. 202, 283 S.W.2d 239.

In its opinion on rehearing, the Texas Court of Criminal Appeals, having misconstrued the doctrine of *Irvin v. Dowd*, says:

"It is the view of the writer that, insofar as it may be construed as requiring a change of venue because jurors must be accepted who have read newspaper accounts of the case containing inadmissible facts, the Williams case should be overruled."

A state court may not overrule due process of law.

The rule of due process, which the Texas Court of Criminal Appeals refuses to follow, is announced in *Marshall v. United States*, as follows:

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt v. United States*, 218 U.S. 245, 251, 54 L. ed. 1021, 1029, 31 S. Ct. 2, 20 Ann Cas. 1138. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. *We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence.* The prejudice to the defendant is almost certain to be as great when the evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. Cf. *Michelson v. United States*, 335 U.S. 469, 475, 93 L. ed. 168, 173, 69 S. Ct. 213, *It may indeed be greater*

for it is then not tempered by protective procedures." (Emphasis added)

As Justice Clark said in *Irvin v. Dowd*, 366 U.S. 717, 722:

"His verdict (a juror's) must be based upon the evidence developed at the trial."

Inadmissible evidence permitted to be introduced upon a trial merely presents the question of error from inadmissible testimony.

But inadmissible evidence received by a juror outside the courtroom violates due process, because a defendant is entitled to be tried by evidence offered upon a trial, to which he may object.

This is what *Irvin v. Dowd* and *Marshall* held, and it is what *Williams v. Texas* held, before it was overruled by the Court in this *Estes* case.

The jurors in this *Estes* case had received the following evidence through the news media, which the trial court in the Bill of Exceptions held was not admissible upon the trial, and which the jury carried with it in its deliberations:

(1) At least six of the jurors (Hamilton, Robertson, Gordon, Florey, Mallory, and Adkins) who served on petitioner's jury had read or heard on television that associates of petitioner in west Texas had pled guilty in the Federal Court and received heavy sentences. (R. IV, 786-869)

(2) At least eight of the jurors (Hamilton, Robertson, Holifield, Florey, Mallory, Brown, Adkins and Nutt) had heard and read about the death of Henry Marshall, an alleged witness against petitioner. The Attorney General of Texas in Franklin, Texas, was attempting to show Marshall was murdered, and attempting to implicate petitioner. One, Florey, had seen a composite picture of the alleged murderer, which was a drawing of petitioner. (R. IV, 787)

(3) One of the jurors (Robertson) had seen the television of the Courtroom proceedings in Tyler on September 24th, and 25th, 1962. (R. IV, 863-864)

(4) One of the jurors (Florey) knew that Estes had been investigated by the F.B.I. and the Internal Revenue Service, and that there was a congressional investigation, and that Estes was a friend of, and had had transactions with, several public officials in Washington. (R. IV, 865-866)

(5) At least three of the jurors (Robertson, Mallory, Nutt) had formed opinions, from the publicity prior to the trial, that petitioner was guilty. (R. IV, 864; 867; 869). All three doubted they could lay aside the opinion, and thought it would be extremely difficult.

This evidence, which the jury had from outside the courtroom through the news media, the trial court held was not admissible on the trial, and the trial court also certified that the jurors took this evidence with them to the jury room during their delibera-

tions. No room is left for surprise, since the Bill of Exceptions No. 23 (R. IV, 780, 862 and 869) approved by the trial court certifies to and fixes the error.

This is a case such as Mr. Justice Frankfurter had in mind when he referred to *Janko v. United States*, 366 U.S. 716, in *Irvin v. Dowd*, 366 U.S. 717, 730, where "such disregard of fundamental fairness is so flagrant that the Court is compelled"—to reverse this conviction "in which prejudicial newspaper intrusion has poisoned the outcome."

The outburst of the judge in the trial court that he had taken an oath to defend the state constitution, "not the federal," hardly suggested a climate in which the petitioner could be fairly tried.

4. The Evidence Showed a Different Offense, if any, from that Alleged in the Indictment.

The first count of the indictment in this case (See Appendix C, *infra*, pp. 53a-60a) alleges that the defendant by false pretext induced one T. J. Wilson to part with the written instrument, set out in the indictment, which was the property of T. J. Wilson and had a value in excess of \$50.00.

Under the Texas statute, Article 1545, Penal Code, a man may be swindled by being induced to (a) part with a valuable right, or (b) by being induced to part with property (which includes a written instrument) belonging to the swindled person.

The indictment (R. IV, 2) in Count I, upon which defendant was found guilty, alleged the acquisition of property of T J. Wilson. The proof shows the acquisition, if anything, of his signature, which is not property, but at best a valuable right. See, *Hubbert v. Texas*, 66 Tex. Cr. Rep. 370, 147 S.W. 267; and *Johnson v. Texas*, 57 Tex. Cr. 347, 123 S.W. 143.

Under the doctrine of *Cole v. Arkansas*, 333 U.S. 201, petitioner, on the record in this case, has been denied due process. In that case the Court ruled:

"It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him on a charge that was never made". (Emphasis added)

Under the evidence in this case, petitioner acquired no property from the alleged victim. Wilson was induced to lend his name and signature as credit to defendant and his associates for the payment to him (Wilson) of \$7,500.00, and an indemnity and guarantee against loss.

This issue of due process is presented where the evidence is totally void of evidentiary support. See *Garner v. Louisiana*, 368 U.S. 157; *Thompson v. Louisville*, 362 U.S. 199; and *Smith v. Texas*, (D.C. Tex., S.D., Houston Division) 225 F. Supp. 150.

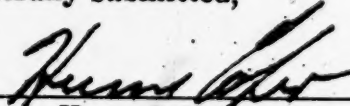
It follows that petitioner's conviction on the evidence constitutes a serious deviation from estab-

lished principles of due process of law within the meaning of the Fourteenth Amendment.

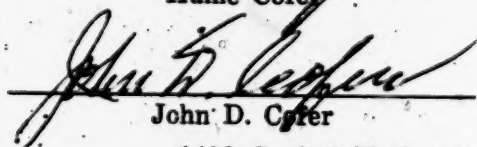
CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to the Court of Criminal Appeals of Texas.

Respectfully submitted,



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Of Counsel



APPENDIX A
Opinions Below
and
Clerk's Certificate

1a

APPENDIX A

**Opinions Below
and Clerk's Certificate**

**IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS**

No. 36,086

BILLIE SOL ESTES, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Smith County

Opinion

The conviction is for swindling; the punishment, eight years' confinement in the penitentiary.

Trial was in the 7th Judicial District Court of Smith County, upon a change of venue from the 143rd Judicial District Court of Reeves County, on the court's own motion.

The indictment contained four counts, count 1 charging the offense of swindling; count 2, the offense of theft, and counts 3 and 4, the offense of theft by bailee.

Upon the trial, counts 1, 2, and 3 were submitted to the jury, the state having abandoned count 4.

Count 1, under which appellant stands convicted, alleged, in substance, that on or about the 2nd day of March, 1961, the appellant did knowingly and by means of false pretense and representations made to T. J. Wilson, induce Wilson to sign and deliver to him an instrument in writing of the value of more than \$50, which conveyed and secured a valuable right. The instrument set out in the indictment was a chattel mortgage from T. J. Wilson, as buyer and mortgagor, to Superior Manufacturing Company on:

"75—500 GALLON SUPERIOR NH3 TANKS MOUNTED ON AND TOGETHER WITH

"75—4 WHEEL SUPERIOR TANKS COMPLETE WITH TIRES, AXES, WHEELS AND HOSE ASSEMBLIES.

"SERIAL NO'S. SF-17214-500 THRU SF-17288-500

"65—SUPERIOR NH3 APPLICATORS COMPLETE WITH REGULATORS, SHANKS, KNIVES, HOSES, AND 65-200 GALLON NH3 TANKS.

"TANK SERIAL NO'S. 8304 THRU 8368,"

for which, according to the terms of the mortgage, the mortgagor agreed to pay the sum of \$121,850, the sum of \$27,350 having been paid, leaving a balance owing by Wilson of \$94,500, payable in monthly installment of \$1,575 each.

It was alleged that appellant did falsely and fraudulently represent to Wilson that by signing

and executing the instrument he was purchasing the property and that the said property was security for the instrument in writing; that Wilson relied upon such representations, when in truth and in fact he was not purchasing the property and said property did not secure said instrument and was not security thereon.

T. J. Wilson, called as a witness by the state, testified that he lived in Pecos and was engaged in the business of farming; that in January, 1961, appellant approached him relative to his using his (Wilson's) credit in purchasing fertilizer tanks and applicators and leasing them back to appellant; that appellant offered him 10% of the purchase price as a bonus rental and asked Wilson to furnish him with a financial statement; that he furnished the financial statement and later left word at appellant's office that he was not interested in the proposition; that later, on March 7, 1961, he went to the appellant's office in Pecos, at which time Harold Orr, vice-president of the Superior Tank & Manufacturing Company, of Amarillo, was present; that appellant introduced him to Orr and after some discussion he told appellant he was not interested in the transaction; that appellant then stated he would make the down payment and would be liable for the entire purchase price of the equipment, and Orr stated he would give a letter from the Superior Manufacturing Company holding the witness harmless in the event appellant did not make the payments, and appellant stated he would give a like letter.

Wilson stated that, thereupon, it was agreed that he would purchase the equipment, and appellant handed him a chattel mortgage which he signed and delivered back to appellant. State's exhibit No. 15, upon being identified by the witness as the mortgage which he signed and delivered to appellant, was introduced in evidence. The mortgage which had been duly filed in the office of the county clerk was a mortgage executed by Wilson to Superior Manufacturing Company on the equipment described in the indictment, reciting a purchase price of \$121,850, with a down payment of \$27,350 and balance due of \$94,500, payable in monthly installments of \$1,575 each.

Wilson further testified that at the time he signed and delivered the mortgage to appellant he received a check from him for \$7,500 as payment for his entering into the transaction. He further testified that he signed the mortgage because of the representations made to him by appellant; that he was told that the equipment was ready for delivery and would be delivered the next morning in Hale County; that he believed the equipment listed in the mortgage was in existence, as represented, and that he would not have signed the mortgage had he known there was no such equipment in existence.

It was shown that no down payment was made on the mortgage contract. It was further shown that a check from C. I. T. Corporation, dated March 10, 1961, was issued to Superior Manufacturing Company in the amount of \$268,431.76, for the purchase of our contracts, including the Wilson con-

tract which was purchased for \$70,275, and that the proceeds of a check issued by Superior Manufacturing Company on March 13, 1961, in the amount of \$268,431.76, covering the four contracts, found its way into the bank account of appellant in Pecos, Texas, on March 15, 1961.

Harold Orr, called as a witness by the state, testified that he was president of the Superior Manufacturing Company and that he and his company had an arrangement with appellant whereby the company would sell equipment on bogus contracts containing fraudulent serial numbers and send the proceeds of such sales to appellant. Orr testified that in the transaction with the state's witness Wilson, it was represented that the tanks would be delivered that day or the next and that in the transaction Superior Manufacturing Company received \$70,250 from G. I. T. Corporation, which money was sent to appellant. He further swore that the property and equipment purchased by Wilson was never delivered; that, in fact, such property was never in existence; and that the company never manufactured any tanks having serial numbers indicated in state's exhibit No. 15. He stated that such numbers were "made up" and that, in fact, there was no such equipment.

Appellant did not testify and, other than certain exhibits introduced, offered no evidence in his behalf.

Appellant urges six points of error in support of his contention that certain actions and rulings

of the court denied him a fair trial and due process of law under the Constitution of this State and the United States.

We shall discuss the contentions in the order in which the same were presented at the trial.

Presented by bystanders' bill of exception No. 1 and formal bill of exception No. 2, appellant's first contention is that the District Court of Reeves County erred in refusing to permit him to interrogate the grand jurors after they were impaneled and before they returned the indictment, as to their bias and prejudice against him because of widespread publicity given his case by the news-media, and in later overruling his motion to quash and dismiss the indictment because of publicity in the case which, it is charged, denied him a fair and impartial hearing before the grand jury.

It is the appellant's contention that the court's action in refusing to permit his examination of the grand jurors as to bias and prejudice constituted a denial of due process and equal protection of the law.

Art 339, V.A.C.C.P., lists the qualifications of a grand juror, without any allusion to the matter of bias and prejudice.

Art 358, V.A.C.C.P., provides that before any grand jury has been impaneled, any person may challenge the array of jurors or any person presented as grand juror. In no other way shall ob-

jections to the qualifications and legality of the grand jury be heard.

Under Art. 361, V.A.C.C.P., a challenge to the array may be made that those summoned as grand jurors are not in fact those selected by the jury commission, or that the officer who summoned them acted corruptly in summoning any one or more of them. The grounds for challenge to a grand juror are set out in Art. 362, V.A.C.C.P.: that he is not a qualified grand juror; that he is a prosecutor upon an accusation against a person making the challenge; that he is related by consanguinity or affinity to one who is being held on bail or who is in confinement upon a criminal accusation.

Art. 374, V.A.C.C.P., provides that the deliberations of the grand jury shall be secret.

Under the statutes, bias or prejudice is not a ground for challenge of a grand juror in this state, and the court did not err in refusing to permit appellant to examine the grand jurors with reference to such matters, prior to the return of the indictment against him.

We do not agree that such a construction given the statutes constitutes a denial of due process and equal protection of the law in violation of Art. 1, Sec. 10, of the Constitution of this State and in violation of the Constitution of the United States.

In *Beck v. Washington*, 369 U. S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955, cited by appellant, the Supreme

Court did not hold that under the due process clause of the Fourteenth Amendment a state was required to furnish to an accused an unbiased grand jury but specifically stated that such was a question "upon which we do not remotely intimate any view. . . ."

Error is urged by appellant in his bystanders' bill of exception No. 3 to the action of the District Court of Reeves County in changing venue of the cause, on its own motion, to Smith County.

The bill of exception and record reflect that prior to ordering the change of venue, a jury panel of thirty-two names had been selected in the trial of another criminal case then pending against appellant in said court. At such time, appellant asked permission to withdraw his announcement of ready and moved the court to pass the case until such time as conditions in the county resulting from publicity should abate. Thereupon, the court discharged the jury panel and announced his tentative decision to transfer the case and three other causes pending against the appellant to Smith County.

Appellant filed his opposition to such a change of venue and attached the affidavit of three citizens of Smith County, which is more than five hundred miles from Reeves County, who swore that he could not get a fair and impartial trial in that county.

After a hearing in which the three compurgators testified in opposition to the change of venue, the court entered its order changing venue in the in-

stant case and in three other cases pending against appellant—all upon new indictments that had been returned by the grand jury—to Smith County, which order recited that it appeared to the court that a trial alike fair and impartial to the accused and to the state, could not be had in Reeves County because the case had received such widespread publicity in the county and because of the special knowledge and information of the citizens of the county resulting from Reeves County being the residence of both the appellant and the state's witnesses. The court further found and recited in the order that the courthouse of Loving, being the nearest to the courthouse in Reeves County, was subject to the same objection; that a fair and impartial trial to the accused and to the state, alike, could not be had in that county; and that said condition existed in all other counties adjoining Reeves County and in the adjoining judicial districts.

The order entered by the court was in compliance with Arts. 560 and 566, V.A.C.C.P., which provides:

(Art. 560: "On court's own motion . . .

"Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue."

(Art. 566) "If adjoining counties objectionable

"If it be shown in the application or otherwise that all the counties adjoining that in which the prosecution is pending are subject to some valid objection, the cause may be removed to such county as the court may think proper."

It has been the holding of this court that under these articles the district judge is vested with a discretion which, although it is judicial and not a personal one, will not be interfered with unless abused. *Mayhew v. State*, 155 S. W. 191; *Mills v. State*, 59 S. W. 2d 147.

In *Spriggs v. State*, 289 S. W. 2d 272, we said:

"There is perhaps no provision in our laws which places in the hands of a trial judge more inherent power than does this statute [Art. 560, *supra*], for he can exercise the authority there conferred when he is 'satisfied . . . from any cause' that a trial fair to the accused and to the state cannot be had in the county where the case is pending.

The record in the instant case, showing that before the court ordered venue changed on his own motion a jury panel had been selected in another case pending against appellant in Reeves County and discharged at his request because of widespread publicity in the county, demonstrates to us that the court did not abuse his discretion in changing the venue to Smith County.

By bills of exception No. 4 and No. 23, appellant complains of the court's action in overruling his motions, *made after the jury panel had been selected* in Smith County to discharge the panel and postpone the case or change the venue.

In the motions, appellant alleged that because of widespread publicity given to him and the case by the news media in Smith County, he could not receive a fair and impartial trial. It was alleged that they had read newspapers, followed television publicity, and received information from magazines and other sources as to matters of purported facts in the case which were not admissible at the trial. It was also alleged that of those selected on the panel, twenty-six members thereof testified that they had learned and received facts which were not admissible on the trial of the cause.

In support of such motions, numerous exhibits were offered, consisting of newspaper clippings and photographs concerning appellant and the case pending against him. Many of the newspaper clippings pertained to a grand jury investigation in Robertson County in connection with the death of one Henry Marshall, a United States Department of Agriculture employee, and connected appellant with the inquiry. Other articles dealt with the investigation of appellant's activities in Washington and congressional committees and the interest of both the President and the Attorney General of the United States in the investigation. Other newspaper articles dealt with the business dealings of appellant and his associates and criminal charges against them.

Appellant also called witnesses who resided in Smith County who testified that they had heard purported facts about the case on television and radio; that they had read purported facts about the case in the newspapers; and that they had heard the case discussed, and expressed the opinion that appellant could not receive a fair trial in the county.

The voir dire examination of the jury panel was adopted by appellant for purposes of the motion. Included in the record is the voir dire examination of thirty-two members of the panel. A reading of their voir dire examination reflects that most of them had read in newspapers or magazines or had heard on radio and television, including a telecast of the preliminary hearing on September 24 and 25, certain purported facts about the case, but each satisfied the court that he could lay aside any opinion he had formed about the case and render a fair and impartial verdict if taken as a juror in the case.

Appellant's motions for postponement and change of venue were controverted by the state through its district attorney and the affidavit of two other citizens of Smith County who swore that in their opinion the appellant could receive a fair and impartial trial.

The motion for postponement was in fact a second motion, the case having been previously postponed by the court on motion of appellant, because of the absence of witnesses.

Such motion was not a statutory motion but was on grounds addressed to the discretion of the trial

judge. *Trapper v. State*, 84 S. W. 2d 726; *Gordy v. State*, 268 S. W. 2d 126; and *McIntyre v. State*, 360 S. W. 2d 875. A review of the record does not disclose an abuse of discretion by the trial court in refusing to postpone the case.

Appellant insists that the court's action in overruling his motion for change of venue presents error because the voir dire examination of the jurors reveals that nine members of the jury had read certain inadmissible facts about the case. Reliance is had upon *Williams v. State*, 283 S. W. 2d 239, and to the rule stated in the syllabus, as follows:

"Where voir dire examination revealed that at least five members of the jury selected to try rape case had read newspaper accounts containing inadmissible facts, and after defendant had used all his challenges he was required to accept a juror who had read the accounts, it was reversible error to deny motion for change of venue."

While the voir dire examination of the nine jurors discloses that they had read in newspapers and magazines and heard on radio and television certain purported facts about the case which would have been inadmissible upon the trial, none of the jurors were shown to have formed any opinion about the case that would influence their verdict. In the absence of such a showing they were not disqualified. *Herring v. State*, 302 S. W. 2d 428; *Klinedinst v. State*, 265 S. W. 2d 593; *Pugh v. State*, 186 S. W. 2d 258.

The opinion in *Williams v. State*, *supra*, cited by appellant, is not to be construed as holding that a court is required to change venue in every case where some of the jurors have read or heard purported facts about the case which would be inadmissible upon the trial. The holding in the *Williams* case is confined to facts presented in that case, where we held it error to deny a change of venue. To reverse for failure to change venue it must be shown that prejudice reached the jury box. *Everett v. State*, 218 S. W. 2d 471; *Jones v. State*, 243 S. W. 2d 848; *Johnson v. State*, 244 S. W. 2d 235; *Goleman v. State*, 247 S. W. 2d 119; *Aaron v. State*, 275 S. W. 2d 693; *Slater v. State*, 317 S. W. 2d 203; *Moon v. State*, 331 S. W. 2d 312; *Philpot v. State*, 332 S. W. 2d 323.

There is no such showing in the present case. No error is presented in the bill.

By bills of exception Nos. 8, 9, 12, 16, 17, 18, 20, 21, and 22, appellant insists that the court erred in overruling his challenge for cause of the veniremen Owens, Shapley, Johnson, Freeman, Conant, Betts, and Swann, all of whom appellant peremptorily challenged, and to the veniremen Robinson and Mallory, whom appellant was unable to strike (having exhausted his peremptory challenges) and who did serve on the jury, on the ground that all of the veniremen had formed opinions as to appellant's guilt, which would influence their verdict in the case.

Art. 616, V.A.C.C.P., enumerates the reasons for challenge for cause to any particular juror, and, in subdivision 13, provides:

"That from hearsay or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged; if he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged."

We have carefully read the voir dire examination of each of the above-named veniremen. Some stated that they formed no opinion as to the guilt or innocence of appellant, while others stated that from reading newspaper accounts and magazines and watching television they had formed some opinion about the appellant and his guilt or innocence.

Those prospective jurors who indicated that they had formed some opinion about the case stated that they could lay such opinion aside and follow the evidence and the court's charge in rendering their verdict.

It is apparent that the trial court was satisfied that each venireman who stated he had an opinion could lay the same aside and render a fair and impartial verdict upon the law and evidence. Under the record, no abuse of discretion is shown on the part of the court in holding the veniremen qualified. *Burkhalter v. State*, 247 S. W. 539; *Pugh v. State*, 186 S. W. 2d 258; *Klinedinst v. State*, *supra*; *Howell v. State* 352 S. W. 2d 110.

By formal bills of exception Nos. 10, 13, and 14, appellant complains that the court erred during the voir dire examination in interrogating and instructing some of the veniremen with reference to their qualification as prospective jurors in the case. It is appellant's contention that by such action the court conveyed to the jurors his opinion in the case, in violation of Art. 707, V.A.C.C.P.

The bills reflect that during the voir dire examination the court inquired of some of the veniremen if they could lay aside any opinion they had formed about the case and base their verdict upon the law and evidence; inquired of some if they had any opinion as to the guilt or innocence of appellant; instructed some of the veniremen that the indictment was no evidence of guilt and that they would

be so instructed in the charge; asked if they could follow the court's instruction and not consider the indictment as any evidence of guilt; and instructed the veniremen that the burden of proof was on the state and it must prove the defendant guilty beyond a reasonable doubt.

The bills further reflect that in each instance when the court made an inquiry or gave an instruction, the prospective juror was in doubt as to his answers given to certain questions propounded to him by counsel.

Under the record, the court was well within his province in questioning the jurors and explaining to them various phases of the law governing the case. In 35 Tex. Jur. 2d 149, Sec. 97, it is stated:

"... where the qualifications of a juror, and especially his mental attitude toward defendant, have been left in doubt by the examination of counsel, it is not only the right, but may also be the duty, of the judge to question the juror further."

See also, *King v State*, 64 S. W. 245.

We do not agree that the court's statement conveyed to the prospective jurors his opinion as to any phase of the case or the answers which they should give to the questions then being propounded to them.

By bills of exception Nos. 5 and 6, appellant complains of the court's action in permitting live

television of the trial and insists that the manner in which he was subjected to such public dissemination of his trial throughout the nation, both in and out of the presence of the jury, denied him due process of law under the Constitution of this State and of the United States. It is contended that such action by the court required appellant to go to trial with the counsel of his choice, in violation of the ethical standards defined by Canon 35 of the American Bar Association, which seriously hampered counsel in the defense of appellant and denied to him full and adequate representation to which he was entitled under due process.

The bills of exception show that the case was first set for trial for September 24, 1962. On September 24 and 25, a hearing was held by the court on two motions filed by appellant. One motion was that no telecasting of the trial be permitted and the other was for a continuance. At the hearing, the court permitted live telecasting of the proceedings.

At the conclusion of the hearing, the court overruled appellant's motion that the trial not be telecast but granted the motion for continuance and reset the trial for October 22, 1962. On October 22, 1962, the case proceeded to trial on its merits.

Prior to the trial a booth was constructed and placed in the rear of the courtroom, painted the same color as the courtroom, with a small opening across the top for the use of cameras. During the trial, the court permitted telecasting of the proceedings by ABC, NBC, and CBS networks and KRLD

television in Tyler, from the booth in the rear of the courtroom. Such telecasting was on film, without sound. The court did not permit telecasting in the hallway leading into the courtroom or on the second floor of the courthouse, where the courtroom was situated, in order that appellant and his attorneys would not be molested or harrassed in approaching and leaving the courtroom. No live telecasting of the proceedings was permitted by the court except the arguments of state's counsel and the return of the jury's verdict and its acceptance by the court. The arguments of appellant's counsel were not telecast, as requested by them. The bills certify that no juror or witness requested that he not be televised.

Under the facts certified, we fail to preceive any injury to the appellant as a result of the telecasting of the proceedings.

Appellant did not testify or call any witnesses, so it can not be said that he or his witnesses were burdened by the presence of cameras. There is no intimation in the record that any juror or witness was embarrassed or humiliated by reason of the telecast.

In Ray v. State, 221 S. W. 2d 249, this court refused to speculate and presume injury to an accused where photographers took pictures of the defendant and the jury while the judge was out of the courtroom.

In *Farrar v. Stote*, 277 S. W. 2d 114, this court refused to reverse a conviction because photographs were made of the appellant, his counsel, and the jury during the trial, in the absence of an objection *and showing of injury to appellant*.

The manner in which the trial judge permitted and controlled telecasting of the instant trial was well within the supervision and control of such coverage granted to him under Canon XXVIII of the Canons of Judicial Ethics since approved by the Judicial Section of the State Bar of Texas.

The contention that appellant was denied full and adequate representation, because of his counsel's belief in Canon 35 of the American Bar Association barring photographs in the courtroom or broadcasting or telecasting court proceedings, is not borne out by the record. Of the many cases coming to this court, we know of no case where the accused received better or more efficient representation than did appellant in the present case.

By points of error Nos. 7 to 15, appellant complains of other rulings made by the court during the trial and of the court's charge to the jury.

It is first urged that the court erred in not requiring the state to elect upon which count in the indictment it would go to the jury in seeking a conviction of appellant. While separate offenses were charged in the three counts, only one act or transaction was alleged, that being the acquisition by appellant of the instrument in writing.

Under the general rule in this state, the state is not required to elect where the same act or transaction is charged in different counts of an indictment to meet possible variations in the proof. See: 30 Tex. Jur. 2d, Sec. 46, pages 617-620; Davis v. State, 321 S. W. 2d 873; McKinnon v. State, 261 S. W. 2d 335.

We do not construe Art. 1549, V.A.P.C., as amended in 1943, which provides:

"Where property, money, or other articles of value enumerated in the definition of swindling, are obtained in such manner that the acquisition thereof constitutes both swindling and some other offense, the party thus offending shall be amenable to prosecution at the state's election for swindling or for such other offense committed by him by the unlawful acquisition of said property in such manner,"

as requiring the state to elect as to which offense it would prosecute but only permitting the state to elect as to whether it would prosecute for swindling or some other offense. Prior to the 1943 amendment of the statute the state had no right to elect but was required to prosecute for the other offense. Nor do we agree that an election was required, because under the court's charge appellant could be convicted under any of the three counts submitted upon the law of co-principals. Johnson v. State, 8 S. W. 2d 121, and the other authorities cited by appellant in support of his contention that the state should have been required to elect, in view

of the court's charge on principals, are not here applicable, because, in the case cited separate transactions and offenses are shown.

The court did not err in refusing to require the state to elect, and fully protected the appellant in instructing the jury in his charge that they could convict him only on one count in the event they found him guilty.

In his point of error VIII, appellant urges a fatal variance between the fraudulent inducement alleged in the indictment (that Wilson was induced to sign and deliver the mortgage upon appellant's representation that he was purchasing the property and that said property was security for the mortgage) and the proof offered upon the trial when Wilson testified that the entire transaction and not any one factor was the inducement for his entry into the transaction. While Wilson did testify that it was the entire transaction, including the \$7,500 payment made to him and the representations of both appellant and Orr to him, which induced him to sign and deliver the mortgage, he swore positively that he signed the mortgage because of representations made to him by appellant that the property was ready for delivery and that he believed the property was in existence, as represented. In order to constitute swindling it is not necessary that the false pretense should be the sole inducement which moves the injured party to part with his property. 5 Branch's Ann. P. C. 2d at p. 344, Sec. 2827; Blum v. State, 20 Tex. App. 578; McFarland v. State, 75 S. W. 788; Noblitt v. State, 281 S. W. 849. A

further claim of variance is urged by appellant because state's exhibit No. 15, introduced in evidence, bore a number: "5-601C (4-60)" in the left top corner of the instrument, which number was not set out in the indictment in copying the mortgage according to its tenor. Such variance was not fatal, as the number was not a material part of the instrument, proper, and it was unnecessary for the state to allege the number in the indictment. 3 Branch's 2d, Sec. 1588; Anderson v. State, 161 S. W. 2d 88; Pate v. State, 361 S. W. 2d 875.

The further contention is made by appellant that state's exhibit No. 15, for various reasons, was not binding on Wilson as maker and therefore the instrument had no value. We need not discuss the reasons urged by appellant as to the invalidity of the instrument, as the record reflects that the chattel mortgage contract in question obligated Wilson to pay the sum of \$94,500 and that after he signed the same it was re-copied at the direction of Orr and, as re-copied, sold by Superior Manufacturing Company to C. I. T. Corporation for \$70,275. Such instrument was shown to have a value in excess of \$50.

Appellant's remaining points of error relate to the court's charge.

In his charge to the jury, the court defined the offense of swindling substantially as the same is defined in Art. 1545, V.A.P.C., and set out in the charge seven essential elements of the offense. While the court's definition omitted the words, "goods,"

"services," and "any other thing of value," found in the statute, such omission was not called to the court's attention and does not present reversible error. The court also fully charged the jury on the law of principals.

In paragraph 3 of the charge, the court submitted to the jury the issue of appellant's guilt under count 1 of the indictment and instructed the jury that if they believed from the evidence beyond a reasonable doubt that the appellant either himself or acting as a principal, as the term was defined for them, on the date alleged

"by means of the alleged false pretenses, devices and fraudulent representations specifically set out in the *first count* of the indictment, did then and there by means of said false pretenses, devices and fraudulent representations, if any, acquire from the said T. J. Wilson said instrument of writing with said signature affixed thereto, and you further believe, beyond a reasonable doubt, that said false pretenses, devices and representations, if any, were relied upon by T. J. Wilson, and did induce the said T. J. Wilson to sign and place his, the said T. J. Wilson's signature on the instrument of writing, alleged in the indictment, and did induce the said T. J. Wilson to deliver to him, the said BILLIE SOL ESTES, said instrument of writing with the intent to appropriate the said instrument of writing to the said BILLIE SOL ESTES' own use, and that said instrument of writing conveyed and secured a valuable right, and that said instrument of writing was then and there of the value of more than \$50.00 and

was the property of T. J. Wilson, and the said BILLIE SOL ESTES did so acquire said instrument of writing by then and there falsely pretending and fraudulently representing to the said T. J. Wilson that he, the said T. J. Wilson, by signing and executing said instrument of writing was purchasing the property specified and listed in said instrument of writing, and that said property, as listed and specified in said instrument of writing, secured said instrument of writing and was the security thereon, then you will find the Defendant guilty of swindling as charged in the first count of the indictment and assess his punishment at confinement in the State Penitentiary for a term of not less than two nor more than ten years. Unless you so find, or if you have a reasonable doubt thereof, you will acquit the Defendant."

In paragraph 4, the court instructed the jury that if they believed from the evidence or had a reasonable doubt thereof that appellant did not by means of the alleged false pretenses and devices induce Wilson to sign and place his name on the instrument or that the appellant did not make any false pretenses or representations to Wilson, or if they believed that appellant at the time of receiving the instrument had no intent to appropriate it to his own use and benefit, or if they believed that the said instrument of writing did not convey or secure a valuable right and that said instrument was not of the value of more than \$50, or if they believed that the instrument of writing was not the property of T. J. Wilson, they should acquit the appellant and say by their verdict, "Not Guilty."

In paragraphs 21-A, 21-B, 21-C, 21-D, 21-E, and 21-F, the court submitted certain affirmative defenses to the jury.

In paragraph 21-A, the jury were told to acquit appellant if they believed from the evidence or had a reasonable doubt thereof that when Wilson signed, executed, and delivered state's exhibit No. 15, he knew he was not purchasing the property specified therein.

In paragraphs 21-B, 21-C, 21-D, 21-E, and 21-F, the jury were told that if they believed from the evidence or had a reasonable doubt thereof that the sole reason or reasons for Wilson's signing state's exhibit No. 15 was the payment of \$7,500 by the appellant to him, or because appellant executed and delivered to him his written contract of equipment lease covering the identical equipment described therein, or because Superior Manufacturing Company gave him a letter of indemnity, or because appellant promised to pay all installments to become due on state's exhibit No. 15, then to acquit him of the offense charged in count 1 of the indictment.

Appellant insists that the court erred in submitting such defense issues upon the theory of "sole reason" for Wilson's signing state exhibit No. 15, rather than upon the theory of "inducing cause," as requested by him in his requested charges Nos. 3, 4, 5, 6, and 7. The requested charges would have instructed the jury to acquit appellant if they found that Wilson was induced to enter into the trans-

action and sign state's exhibit No. 15 because of the \$7,500 payment or certain other specified reasons but for which he would not have executed the same.

We are unable to agree that the theory upon which the court submitted the affirmative defense was erroneous. The ultimate issue to be determined by the jury was whether the alleged false pretext was an inducing cause for Wilson's entering into the transaction. If there were other inducements which were the "sole reasons" for Wilson entering into the transaction, no offense was committed and appellant was entitled to an acquittal. This theory was given to him in the affirmative defenses submitted by the court.

In the cases relied upon by appellant, a defensive issue raised by the evidence was not submitted to the jury. Such is not the case at bar, because, as shown above, every affirmative defense raised by the evidence was submitted to the jury.

Complaint is made to the court's refusal to give certain defensive charges requested by appellant. We have examined each requested charge and find no reversible error in the court's action in refusing to give the same. Some of the charges would have been upon the weight of the evidence. Some were not called for by the evidence and the others were adequately covered by the affirmative defensive issues submitted to the jury.

The court's failure to define the term "property," as defined in Art. 1418, V.A.P.C., does not present error. Under the indictment and court's charge the jury were required to find, before convicting, that appellant did by means of false pretenses and fraudulent representations acquire the *instrument of writing* set out in the indictment. A definition of "property" would not have aided the jury in passing upon the issue.

Nor did the court err in refusing to instruct the jury that the state's witnesses C. M. Wesson and Adam Garcia, both of whom were employees of appellant, were accomplice witnesses as a matter of law. While Wesson testified that, after the date of the alleged offense, at appellant's request and direction, he changed certain serial numbers on anhydrous tanks, and Garcia testified that he changed certain numbers under Wesson's direction, neither witness was shown to have had any knowledge of the representations made by appellant to the injured party, Wilson. The court correctly submitted to the jury the issue as to their being accomplices and did not err in refusing to instruct the jury that they were accomplices as a matter of law.

Finding the evidence sufficient to support the conviction, and no reversible error appearing, the judgment is affirmed.

DICE, Judge

(Delivered January 15, 1964)

Opinion approved by the court.

Concurring Opinion

In view of the fact that I prepared for the court the opinion in *Williams v. State*, 283 S. W. 2d 239, and because appellant relies so strongly upon such case, I deem it proper to make the following observations:

The record in *Williams* reflects that the case had received publicity only in Matagorda County newspapers and in the adjacent area. The offense was committed, the case tried in Matagorda County, and the jurors stated they had read newspaper accounts of the case, and the voir dire examination revealed that they did not enter the jury box with open minds. After the reversal by this Court with instructions to change the venue, *Williams* was again tried, this time in Wharton County (*Williams v. State*, 298 S. W. 2d 590), and there was an absence of any showing that the Wharton County jury did not enter the jury box with an open mind.

Appellant contends, without any suggestion from him as to where the case should be sent, that the court erred in overruling his motion to change venue from Smith County to some other county in the State because of the wide-spread publicity which the case had received, and that he was thereby forced to accept jurors who, through news sources, had received inadmissible evidence which was not offered.

at the trial. The answer to this contention would seem to lie in the exhibits introduced by appellant.

ANDERSON COUNTY

Palestine Herald-Press

ANDREWS COUNTY

Andrews County News

ANGELINA COUNTY

Lufkin News

BAILEY COUNTY

Muleshoe Journal

BASTROP COUNTY

Bastrop Adviser

BAYLOR COUNTY

Baylor County Banner

(in Seymour)

BEE COUNTY

Beeville Bee-Picayune

BELL COUNTY

Temple Cen-Tex Record

Killeen Daily Herald

Temple Telegram

BEXAR COUNTY

San Antonio News

San Antonio Express

San Antonio Light

BOWIE COUNTY

Bowie County News

(in New Boston)

Texarkana Daily News

Texarkana Gazette

BRAZORIA COUNTY

Brazos Port Facts

(in Freeport)

BRAZOS COUNTY

Bryan Eagle

The Battalion

(in College Station)

BRISCOE COUNTY

Briscoe County News

(in Silverton)

BROWN COUNTY

Brownwood Bulletin

CALLAHAN COUNTY

Cross Plains Review

CAMERON COUNTY

Brownsville Herald

Harlingen Press

Harlingen Star

CAMP COUNTY

Pittsburg Gazette

CARSON COUNTY

Groom News

Panhandle Herald

CHEROKEE COUNTY

Rusk Cherokeean

Cherokeean Star-Journal

(in Jacksonville)

Jacksonville Progress

CHILDRESS COUNTY

Childress Index

CLAY COUNTY

Henrietta Record

COLEMAN COUNTY

Santa Anna News

COLLINS COUNTY

Frisco Journal

Farmersville Times

McKinney Courier-Gazette

COMANCHE

De Leon Free Press

CORYELL COUNTY

Four County News

(in Evant)

Gatesville Messenger

Coryell County News

(Gatesville)

CROSBY COUNTY

Ralls Banner

Lorenzo Tribune

DALLAM COUNTY

Dalhart Texan

DALLAS COUNTY

Dallas Morning News

Garland Daily News

Grand Prairie Texan

Park City News (in Dallas)

Richardson News
 Garland Herald
 Grand Prairie News-Texas
 Dallas Times-Herald
DAWSON COUNTY
 Lamesa Reporter
DEAF SMITH COUNTY
 Hereford Sunday Brand
DENTON COUNTY
 Lewisville Leader
 Denton Record-Chronicle
DE WITT COUNTY
 Cuero Record
ECTOR COUNTY
 Odessa American
ELLIS COUNTY
 Waxahachie Light
 Ennis News
 Palmer Rustler
 Italy News-Herald
EL PASO COUNTY
 El Paso Herald-Post
 El Paso Times
ERATH COUNTY
 Stephenville Daily Empire
 Stephenville Empire
FALLS COUNTY
 Marlin Daily Democrat
FANNIN COUNTY
 Bonham Favorite
FLOYD COUNTY
 Floyd County Hesperian
 (Floydada)
FORT BEND COUNTY
 Fort Bend Reporter
 (in Rosenberg)
FREESTONE COUNTY
 Wortham Journal
 Fairfield Reporter
FRIO COUNTY
 Pearsall Leader
GAINES COUNTY
 Seminole Sentinel
GALVESTON COUNTY
 Texas City Sun
 La Marque Manland Times

Galveston Tribune
 Galveston News
GONZALES
 Gonzales Daily Inquirer
 Nixon News
 Waelder Home Paper
GRAY COUNTY
 Pampa Daily News
 Pampa Daily
 Pampa News
GRAYSON COUNTY
 Whitewright Sun
 Sherman Democrat
 Denson Herald
GREGG COUNTY
 Longview News
 Kilgore News-Herald
 Gladewater Daily Mirror
 Longview News-Journal
GUADALUPE COUNTY
 Seguin Enterprise
HALE COUNTY
 Plains Farmer
 (in Plainview)
 Petersburg Journal
 Plainview Herald
HAMILTON COUNTY
 Hico News Review
HARDEMAN COUNTY
 Quanah Tribune-Chief
HARDIN COUNTY
 Silsbee Bee
 The Oil City Visitor
 (in Sour Lake)
HARRIS COUNTY
 Houston Chronicle
 Houston Press
 Pasadena Citizen
 Baytown Sun
 Highland Star
 Houston West Side
 Reporter
 Houston Post
HARRISON COUNTY
 Marshall News-Messenger
HAYS COUNTY

San Marcos Record
HENDERSON COUNTY

Malakiff News

Athens Daily Review

HIDALGO COUNTY

Edinburg Daily Review

Weslaco News

Valley Evening Monitor
 (in McAllen)

Mission Times

HILL COUNTY

Hillsboro Evening Mirror

HOCKLEY COUNTY

Levelland Sun-News

HOPKINS COUNTY

Sulphur Springs News-
 Telegram

HOWARD COUNTY

Big Spring Herald

HUNT COUNTY

Greenville Herald-Banner

HUTCHINSON COUNTY

Borger News-Herald

JACK COUNTY

Jacksboro Gazette-News

JASPER COUNTY

Jasper News Boy

JEFFERSON COUNTY

Port Arthur news

Beaumont Enterprise

JIM WELLS COUNTY

Alice Daily Echo

JOHNSON COUNTY

Cleburne Times-Review

JONES COUNTY

Stamford American

KERR COUNTY

Kerrville Times

KIMBLE COUNTY

Junction Eagle

KLEBERG COUNTY

Kingsville Record

LAMAR COUNTY

Paris News

Deport Times

LAMB COUNTY

County Wide News

(in Littlefield)

Olton Enterprise

Lamb County News

(in Littlefield)

LA SALLE COUNTY

Wortham Journal

LAVACA COUNTY

Lavaca County Tribune

(in Hallettsville)

New Era Herald

(in Hallettsville)

Shiner Gazette

LEON COUNTY

Leon County News

(in Centerville)

LIBERTY COUNTY

Liberty Vindiction

LIMESTONE COUNTY

Groesbeck Journal

Mexia Daily News

LUBBOCK COUNTY

Lubbock Avalanche-Journal

Lubbock Avalanche

MADISON COUNTY

Madisonville Meteor

MARTIN COUNTY

Stanton Reporter

MATAGORDA COUNTY

Bay City Tribune

MAVERICK COUNTY

Eagle Pass News Guide

McLENNAN COUNTY

Waco News-Tribune

Mart Herald

Riesel Rustler

Waco Times-Herald

Waco Tribune-Herald

MIDLAND COUNTY

Midland Reporter-Telegram

MILAM COUNTY

Rockdale Reporter

MONTAGUE COUNTY

Bowie News

MONTGOMERY COUNTY

Conroe Courier

MOORE COUNTY

Moore County News
(in Dumas)

MORRIS COUNTY

Naples Monitor

NACOGDOCHES COUNTY

Nacogdoches Daily Sentinel

NAVARRO COUNTY

Corsicana Sun

Kerens Tribune

Corsicana Semi-Weekly
Light

NOLAN COUNTY

Sweetwater Reporter

NUECES COUNTY

Corpus Christi Times

Corpus Christi Caller

Corpus Christi Star

Corpus Christi Caller-Times

OCHILTREE COUNTY

Ochiltree County Herald

(in Perryton)

OLDHAM COUNTY

Vega Enterprise

ORANGE COUNTY

Vidor Vidorian

Orange Leader

PALO PINTO COUNTY

Mineral Wells Index

PARKER COUNTY

Weatherford Democrat

PECOS COUNTY

Fort Stockton Pioneer

POLK COUNTY

Polk Enterprise

(in Livingston)

POTTER COUNTY

Amarillo Citizen

Amarillo Daily News

REEVES COUNTY

Pecos Independent

Pecos Independent

and Enterprise

Pecos Daily News

ROBERTS COUNTY

Miami Chief

ROBERTSON COUNTY

Franklin Texan

Colvert Tribune

Hearne Democrat

RUNNELS COUNTY

Winters Enterprise

RUSK COUNTY

Henderson Daily News

SAN PATRICIO COUNTY

San Patricio County News

(in Sinton)

SCURRY COUNTY

Snyder News

SHELBY COUNTY

East Texas Light

(in Tenaha)

Center Champion

SMITH COUNTY

Tyler Courier-Times

Tyler Star

Tyler Courier-Times-

Telegraph

STEPHENS COUNTY

Breckenridge American

SUTTON COUNTY

Devil's River News

(in Sonora)

SWISHER COUNTY

Tulia Herald

TARRANT COUNTY

Fort Worth Press

Arlington Journal

Fort Worth Weekly

Livestock Reporter

Fort Worth East Side

Times

Fort Worth Star-Telegram

TAYLOR COUNTY

Abilene Reporter

Merkel News

Jim Ned Valley Reporter

(in Tuscola)

Abilene Reporter-News

TOM GREEN COUNTY

San Angelo Standard-

Times

(See references to news accounts set forth in foot note) *which illustrate the state-wide publicity which the case had received and which would render it highly improbable that a jury selected from the citizenry of any of our 253 counties other than Smith, where he was tried, would not contain a sizeable number who had heard of appellant and his far-flung financial manipulations. Appellant's counsel seems to recognize this fact, because he states in his brief that "Probably no case in this state has ever received the publicity treatment that this case received during the spring, summer and fall of 1962." I quote further from his brief:

San Angelo Standard
TRAVIS COUNTY
 Austin American-Statesman
 Austin American
 Austin Statesman
TRINITY COUNTY
 Trinity Standard
VAL VERDE
 Del Rio Herald
 Del Rio News-Herald
VICTORIA COUNTY
 Victoria Advocate
WALKER COUNTY
 Huntsville Item
WARD COUNTY
 Monahans News
WASHINGTON COUNTY
 Brenham Banner-Press
WEBB COUNTY
 Laredo News
 Laredo Times
WHARTON COUNTY
 El Campo Leader News
WICHITA COUNTY

Wichita Falls Times
 Electra Star News
 Wichita Falls Record-News
WILBARGER COUNTY
 Vernon Record
WILLACY COUNTY
 Raymondville Chronicle
WILLIAMSON COUNTY
 Williamson County Sun
 (Georgetown)
WINKLER COUNTY
 Winkler County News
 (in Kermit)
 Wink Bulletin
WISE COUNTY
 Bridgeport Index
WOOD COUNTY
 Wood County Democrat
 (Quitman)
YOUNG COUNTY
 Graham Leader
NATIONAL PUBLICATIONS
 Farm and Ranch Magazine
 Argosy Magazine

*This parenthetical reference and the footnote were deleted when this opinion was withdrawn and refiled after Motion for Rehearing.

"The Saturday Evening Post, The Readers Digest, Time, Life all had feature stories upon the Estes story giving in detail his life history and the details of the alleged fraudulent transactions out of which this prosecution arose. Said story carried full photographs and illustrations of the defendant's alleged fabulous and fraudulent career.

"The metropolitan papers throughout the country featured the story daily. Each day for weeks the broadcasts carried some features of the story."

He poses a dilemma, but does not offer a solution.

The wheels of justice must not stop merely because an accused is of such prominence that he and his alleged misdeeds have been publicized throughout the state. The Supreme Court of Louisiana was confronted with such a problem in *State v. Rini*, 95 So. 400. See also the recent case of *State v. Odom*, 369 S. W. 2d 173, from the Supreme Court of Missouri in which the question is fully discussed. Venue should always be changed where the end sought to be accomplished may be achieved, as was done in the *Williams* case, but all those properly charged with crime must be tried and their guilt or innocence determined. From the record, it is apparent that nothing beneficial to appellant could be accomplished by changing venue countless times.

Morrison, Judge

(Delivered January 15, 1964)

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

No. 36,086

BILLIE SOL ESTES, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Appeal from Smith County

Opinion on Appellant's Motion for Rehearing

This conviction was affirmed upon the opinion prepared by Commissioner Dice, approved by the three Judges of this Court. The Concurring Opinion sets out the further views of Judge Morrison.

The opinion prepared by Commissioner Dice is attacked upon numerous grounds.

The motion for rehearing first complains that we erroneously stated that Exhibit 15 pleaded in the indictment was purchased by C.I.T. Corporation for \$70,275.

We said: "... the record reflects that the chattel mortgage contract in question obligated Wilson to pay the sum of \$94,500 and that after he signed the same it *was re-copied* at the direction of Orr and, *as re-copied*, sold by Superior Manufacturing Company to C.I.T. Corporation for \$70,275 . . ."

The appellant correctly points out that the instrument signed by Wilson and set out in the indictment

was re-typed to correct the description "75-100 gallon Superior NH 3 tanks mounted on and together with 75-4 wheel Superior tanks," by changing the last word, "tanks," to "trailers," and that Orr, upon the instruction of the appellant, signed or forged the name of Wilson to the re-typed and corrected instrument and it was this instrument that was sold to C.I.T. Corporation.

The fact that the instrument described in the indictment and signed by Wilson was not itself sold and delivered to the C.I.T. Corporation does not affect our conclusion that the instrument signed by Wilson which obligated him to pay a large sum of money for property which did not exist, but which was mortgaged to secure the debt, was of the value of over \$50. Wilson's financial statement is in the record and he testified as to its accuracy. He testified that as he left appellant's office, after signing the instrument, he heard the appellant say "... he had my paper sold to C.I.T."

The appellant challenges our disposition of his bills of exception relating to the refusal of the court to permit him to interrogate the grand jurors in Reeves County.

We disclaim any intention of holding contrary to our prior decisions in *Davis v. State*, 374 S.W. 2d 242, and other cases. Cognizance will be taken and relief afforded against the organization of grand juries under circumstances violative of the Constitution.

A grand jury previously impaneled had indicted the appellant. He was not in custody or under bond to await the action of the grand jury impaneled in May. He sought to interrogate the grand jurors for the May Term when they reassembled in July.

Our holding is that the appellant was denied no constitutional or statutory right by the court's refusal to permit him to interrogate members of said grand jury for the purpose of ascertaining bias, prejudice or preconceived opinion as to the appellant's guilt and exercising challenges.

The clear distinguishment between the case before us and *Davis v. State* is that in the *Davis* case evidence adduced at the hearing of the defendant's motion to quash the indictment supported his contention that the grand jury which indicted him was organized under circumstances violative of the Constitution. In the record before us no violation of the Constitution in the organization of the grand jury which indicted the appellant is shown.

The appellant's complaint to our disposition of his Bills of Exception 4 and 23 relating to the trial court's refusal to discharge the jury panel and postpone the trial or grant a change of venue from Smith County is predicated, in a large measure, upon the holding of this Court in *Williams v. State*, 283 S.W. 2d 239.

The opinion in the *Williams* case was distinguished both in the Court's original opinion and by its author in his Concurring opinion herein. It is

the view of the writer that, insofar as it may be construed as requiring a change of venue because jurors must be accepted who have read newspaper accounts of the case containing inadmissible facts, the Williams case should be overruled.

We do not agree that the Supreme Court in *Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed. 2d 751, 81 S.Ct. 1639, adopted or announced such a rule. In that case the Supreme Court said that the failure to accord an accused a fair hearing violates even the minimal standards of due process; that a fair trial in a fair tribunal is a basic requirement of due process; that the jurors' verdict must be based upon the evidence developed at the trial, and that the theory of the law is that a juror who has formed an opinion cannot be impartial. The Supreme Court qualified the latter statement as follows:

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence pre-

sented in court. *Spies v. Illinois*, 123 U.S. 131, 31 L.Ed. 80, 8 S. Ct. 21, 22; *Holt v. United States*, 218 U.S. 245, 54 L.Ed. 1021 31 S.Ct. 2, 20 Ann. Cas. 1138; *Reynolds v. United States* (US) *supra*.

"The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.' *Lisenba v. California*, 314 U.S. 219, 236, 86 L.Ed. 166, 180, 62 S.Ct. 280. As stated in *Reynolds*, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact. . . .'

"The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside. . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' . . . As was stated in *Brown v. Allen*, 344 U.S. 443, 507, 97 L.Ed. 469, 515, 73 S.Ct. 397, the 'so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors."

In *Irvin v. Dowd*, venue was changed to an adjoining county. In the case before us venue was changed,

******(after the appellant had sought a change of venue), to Smith County, more than five hundred miles from Reeves County where the indictment was returned. The venue was changed on the court's own motion, the court having found that in Reeves County and in all counties adjoining, and in adjoining judicial districts, a trial fair alike to the state and the defendant could not be had.

The holding in *Irvin v. Dowd* closely parallels the Texas Statute (Art. 616 (13) V.A.C.C.P.) which provides that the court, if satisfied that he is impartial and will render an impartial verdict, may in its discretion, admit as competent to serve in the case a juror who, from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay has formed an opinion or a conclusion as to the guilt or innocence of the defendant where the juror states he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence.

Whether the trial judge abused his discretion in refusing to postpone the trial or change the venue from Smith County must be determined in the light of the fact that the trial was had more than five hundred miles from the county where the offense was allegedly committed and the indictment returned; the voir dire testimony of the impaneled jurors, and the fact that the newspaper accounts, telecasts, broadcasts and other hearsay upon which some of

******Deleted by order of the Court after Second Motion for Rehearing, no such change of venue having been sought by appellant.

the jurors had formed an opinion were circulated generally throughout the state.

We find no support in the record for the contention made in the motion for rehearing: "Three of the jurors who actually served in this Estes case expressed opinions that defendant was guilty."

The appellant forcefully argues in favor of Canon 35, Canons of Judicial Ethics of the American Bar Association, and against the view that the supervision and control of broadcasting or televising of court proceedings shall be left to the trial judge who has the inherent power to exclude or control such coverage.

We are not called upon to pass upon the merits of Canon 35. It is not binding upon the courts of this state.

We remain convinced that the coverage of appellant's trial in the manner set out in our original opinion was not a violation of due process and equal protection of law or other constitutional safeguard.

We do not, as appellant suggests, hold that there is no county in Texas where the appellant could get a fair trial, nor do we agree with appellant's contention that he could not and did not get a fair trial in Smith County.

Remaining convinced that Judge Dice's opinion correctly disposes of the appeal, appellant's motion for rehearing is overruled.

Woodley, Presiding Judge

(SEAL)

(Delivered March 11, 1964.)

Minutes of the Court of Criminal Appeals of Texas

No. 36,086

BILLIE SOL ESTES, *Appellant*

v.

THE STATE OF TEXAS, *Appellee*

Correction to Main Opinion of Motion for Rehearing

Opinion on Rehearing amended by deleting "after the appellant had sought a change of venue," (Par. 2, p. 4).

Woodley, P.J.

April 15, 1964.

Certificate of Clerk of Court of Criminal Appeals

**CLERK'S OFFICE, COURT OF
CRIMINAL APPEALS**

AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 36,086, styled:

BILLIE SOL ESTES,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee

judgment of the 7th Judicial District Court of Smith County, Texas, was affirmed by this Court on January 15, 1964; Appellant's Motion for Rehearing overruled March 11, 1964; Appellant's Second Motion for Rehearing overruled April 15, 1964, and order staying mandate and all other proceedings, to permit appellant to seek a writ of certiorari from the Supreme Court of the United States, was issued and filed April 16, 1964.

THEREFORE, with the overruling of Appellant's Second Motion for Rehearing, this cause was disposed of by this Court on April 15, 1964, appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas, and the court of last resort of Texas in criminal cases. Said judgment has now become final on the docket of this Court and mandate would have issued had not same been stayed on motion of appellant to permit application for writ of certiorari.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, this 28th day of May, A.D. 1964.

GLENN HAYNES,

Clerk, Court of Criminal Appeals
of Texas



APPENDIX B

**Constitution
and
Statutes**

APPENDIX B**Constitution and Statutes****Constitution of Texas, Article 1, Section 10. Rights of Accused in Criminal Prosecution**

In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

Title 17, Chapter 8, Articles 1411 and 1418, Texas Penal Code, 1925:

Article 1411. *Property must have some value*

The property must be such as has some specific value capable of being ascertained. It embraces every species of personal property capable of being taken.

Article 1418. *"Property"*

The term "property," as used in relation to the crime of theft, includes money, bank bills, goods of every description commonly sold as merchandise, every kind of agricultural produce, clothing, any writing containing evidence of an existing debt, contract, liability, promise or ownership of property real or personal, any receipts for money, discharge, release, acquittance, and printed book or manuscript, and in general any and every article commonly known as and called personal property, and all writings of every description, provided such property possesses any ascertainable value.

Title 17, Chapter 16, Article 1545. Texas Penal Code 1925:

Article 1545. *"Swindling" defined*

"Swindling" is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same.

**Title 7, Chapter 1, Articles 338, 339, and 361, Texas
Code of Criminal Procedure 1925:**

Article 338. *Shall select grand jurors*

The jury commissioners shall select sixteen men from the citizens of different portions of the county to be summoned as grand jurors for the next term of court for which said commissioners were selected to serve, as directed in the order of the court selecting the commissioners.

Article 339. *Qualifications*

No person shall be selected or serve as a grand juror who does not possess the following qualifications:

1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.
2. He must be a freeholder within the State, or a householder within the county.
3. He must be of sound mind and good moral character.
4. He must be able to read and write
5. He must not have been convicted of any felony.

6. He must not be under indictment or other legal accusation for theft or of any felony.

Article 361. *Challenge to array*

A challenge to the array shall be made in writing for these causes only:

1. That those summoned as grand jurors are not in fact those selected by the jury commissioners.

2. In case of grand jurors summoned by order of the court, that the officer who summoned them had acted corruptly in summoning any one or more of them.

Title 7, Chapter 2, Article 374, Texas Code of Criminal Procedure 1925:

Article 374. *Deliberations secret*

The deliberations of the grand jury shall be secret. Any grand juror or bailiff who divulges anything transpiring before them in the course of their official duties shall be liable to a fine as for contempt of the court, not exceeding one hundred dollars, and to imprisonment not exceeding five days.

Title 7, Chapter 4. Articles 560 and 566, Texas Code of Criminal Procedure 1925:

Article 560. *On court's own motion*

Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and

impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue.

Article 566. *If adjoining counties objectionable*

If it be shown in the application or otherwise that all the counties adjoining that in which the prosecution is pending are subject to some valid objection, the cause may be removed to such county as the court may think proper.

Canons of Judicial Ethics. American Bar Association:

Judicial Canon 35. *Improper publicizing of Court proceedings*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization pro-

ceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

Canons of Judicial Ethics, Integrated State Bar of Texas:

Judicial Canon 28. *Improper publicizing of Court proceedings*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

In connection with the control of such coverage the following declaration of principles is adopted:

- (1) There should be no use of flash bulbs or other artificial lighting.
- (2) No witness, over his expressed objection, should be photographed, his voice broadcast or be televised.

(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

(4) Any violation of the Courts' Rules shall be punished as a contempt.

(5) Where a judge has refused to allow coverage, or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt.

Title 10, Article 856, Texas Code of Criminal Procedure:

(Rules adopted pursuant thereto and printed at pp. 139-140 of the 1963 Cumulative Pocket Part of Vernon's Annotated Code of Criminal Procedure of the State of Texas, Volume 3.)

RULE VI

RULES OF THE COURT OF CRIMINAL APPEALS OF TEXAS

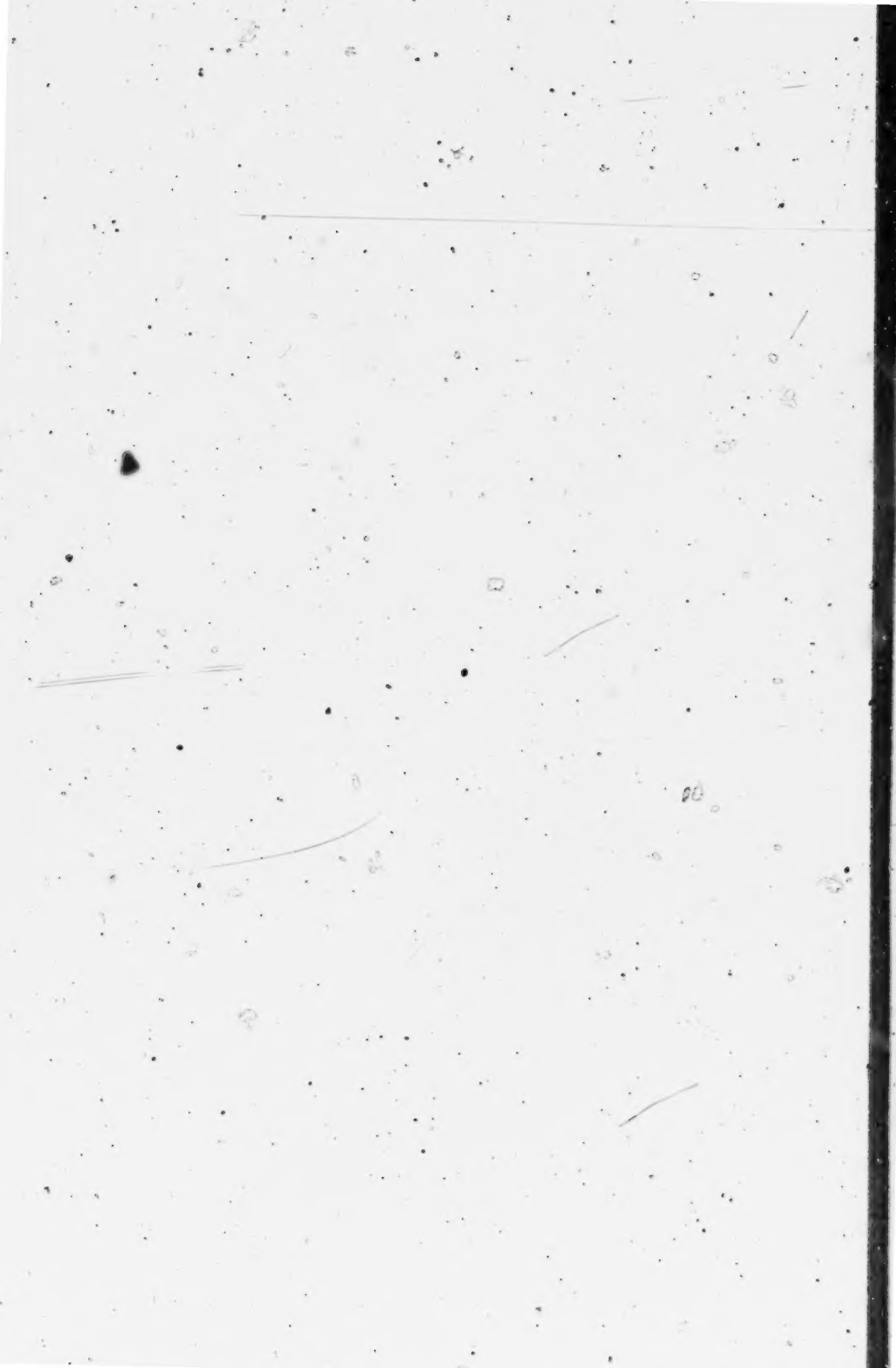
VI. Any party desiring a rehearing of any matter determined by the Court of Criminal Appeals may, within fifteen days after the opinion is handed down, file with the Clerk of said Court his motion in writing for a rehearing thereof, distinctly specifying the grounds relied upon for the rehearing.

If the Court hands down an opinion in connection with the overruling of a motion for rehearing, a further motion for rehearing may be filed by the

losing party within fifteen days after such opinion is handed down; but a further motion for rehearing shall not be made as a matter of right in any other case

Any motion for rehearing may be amended any time before the expiration of the fifteen-day period allowed for filing it, and with leave of the Court any time before its final disposition.

All motions and other matters filed in the Court of Criminal Appeals and not disposed of at the end of the term shall be automatically continued to the next succeeding term of said Court.



APPENDIX C

**Count I,
Indictment**



APPENDIX "C"**Count I****Indictment**

**IN THE NAME AND BY THE AUTHORITY OF
THE STATE OF TEXAS:**

The Grand Jurors, duly selected, organized, sworn and impaneled as such for the County of Reeves, State of Texas, at the May A. D. 1962 Term, of the 143rd Judicial District Court for said County, upon their oaths present in and to said Court that BILLIE SOL ESTES on or about the 2nd day of March, 1961, in the County and State aforesaid, by means of false pretenses and devices, and fraudulent representations then and there knowingly and fraudulently made by him to T. J. WILSON, did induce the said T. J. WILSON to sign and place his, the said T. J. WILSON'S, signature on an instrument of writing, and did induce the said T. J. WILSON to deliver to him, the said BILLIE SOL ESTES, and the said BILLIE SOL ESTES did then and there, and by the means aforesaid, obtain possession of and acquire from the said T. J. WILSON, said instrument of writing with said signature affixed thereto conveying and securing a valuable right, the said instrument being of the tenor following:

Michigan, Missouri and Texas

CHATTEL MORTGAGE

C I T

ORIGINAL FOR

Corporation

FILING OR RECORDING

(Do not use this form in any transaction covering motor vehicles in a state prescribing a special contract form therefor)

This Form is Subject to State Legal Requirements
Buyer's (Mortgagor's) Name T. J. WILSON Dated:

MARCH 2, 1961

(Month, Day)

Street Address 1101 SOUTH PLUM

City PECOS County of REEVES State TEXAS

(Where filing is governed by residence and equipment is in same state show (a) for corporation, its principal office stated in its charter, (b) for partnership, its business address and, in the space at the right hereof the name and residence address of each Partner, and (c) for individual, his residence address. Otherwise, show business address of buyer.)

To SUPERIOR MANUFACTURING COMPANY
(Name of Seller-Mortgagee) .

4110 NORTHEAST EIGHTH AVENUE
(Street Address of Seller-Mortgagee)

AMARILLO
(City)

TEXAS
(State)

The above-named Mortgagor, meaning all Mortgagors jointly and severally, having been quoted both a time and a cash price, hereby purchases from you, on a time price basis, the following described

personal property, together with all attachments, replacements, substitutions and additions, herein-after referred to as "equipment":

(Describe equipment fully including make, kind of unit, serial and model numbers and any other pertinent information)

75—500 GALLON SUPERIOR NH3 TANKS MOUNTED ON AND TOGETHER WITH 75—4 WHEEL SUPERIOR TANKS COMPLETE WITH TIRES, AXLES, WHEELS AND HOSE ASSEMBLIES.

SERIAL NO'S. SF-17214-500 THRU SF-17288-500

65 — SUPERIOR NH3 APPLICATORS COMPLETE WITH REGULATORS, SHANKS, KNIVES, HOSES, AND 65-200 GALLON NH3 TANKS.

TANK SERIAL NO'S. 8304 THRU 8368

for which Mortgagor agrees to pay you or your assigns \$121,850.00 of which \$27,350.00 has been paid

(Full Time Price)

(Down Payment)

and \$—0— is to be paid upon (installation) and (delivery)

\$94,500.00 as balance of purchase price is payable in (Balance)

60 successive, monthly instalments of \$1,575.00 (Insert No. of Months) (Amt. of Each Payment)

each, and one final instalment of \$—0—, commencing April 15, 1961, and then on a like date of each

(Month, Day, Year)

month thereafter until fully paid.

Interest shall be payable monthly on unpaid balances at the rate of xxxx% per annum and after maturity at the highest lawful contract rate. All payments are due at C.I.T. Corporation's office, New York, Chicago or San Francisco. If any note is taken herewith, it shall evidence indebtedness, only and not payment. In consideration of said purchase and to secure the above-described balance. Mortgagor hereby grants, bargains, sells, conveys, confirms and mortgages unto Mortgagee all of said equipment;

TO HAVE AND TO HOLD said equipment unto Mortgagee and Mortgagee's sole use forever. Mortgagor covenants that Mortgagor lawfully possesses said equipment and owns it unencumbered and will warrant and defend said equipment against all claims and demands of all persons.

Said equipment shall be kept at: No. 1101 SOUTH
(Street, Address)
PLUM, City of PECOS, County of REEVES, State of TEXAS, but shall remain personal property and not become part of the freehold.

PROVIDED, NEVERTHELESS, that if Mortgagor pays Mortgagee said balance in money, as stated above, this mortgage shall be void, otherwise to remain in full force and effect.

AND PROVIDED FURTHER, that Mortgagor may retain possession of said equipment until any default hereunder.

Mortgagor agrees: to procure forthwith and maintain fire insurance with extended or combined

additional coverage on the equipment for the full insurable value thereof for the life of this mortgage plus other insurance thereon in amounts and against such risks as you or assigns may specify, and promptly deliver each policy to you or assigns with a standard long form endorsement attached thereto showing loss payable to you and assigns as respective interests may appear; your acceptance of policies in lesser amounts or risks shall not be a waiver of Mortgagor's foregoing obligations to pay reasonable attorney's fees for enforcing rights after buyer's default, all risk of loss, damage or destruction shall at all times be on Mortgagor; to pay promptly all taxes, assessments, license fees and other public or private charges when levied or assessed against equipment or this mortgage or any accompanying note; to satisfy all liens against the same. Time is the essence; if any of said debt be not paid promptly when due or if equipment be removed or disposed of or encumbered, or whenever you or assigns shall deem equipment or the debt insecure, all unpaid instalments shall become immediately due and payable and Mortgagor agrees to return equipment to you or assigns on demand, and you or assigns may, to the extent permitted by law, without notice or legal process enter any premises where equipment may be and take possession of it. Mortgagee may foreclose this mortgage in the manner provided by law and to the extent not prohibited by law equipment may be sold with or without notice at private sale or at public sale, with or without having equipment at the sale, at which you or assigns may purchase, and the proceeds thereof, less expenses of

retaking, repairing, holding, reselling and reasonable attorney's fees (15% of the unpaid balance, if not prohibited by law), credited upon the amount unpaid and Mortgagor will pay the balance forthwith as a deficiency for the breach of this mortgage, any surplus however, to be paid to Mortgagor

Waiver of any default shall not be a waiver of any other default all your rights are cumulative and not alternative, if you assign this mortgage you shall not be assignee's agent for any purpose; Mortgagor will settle all claims, defenses, set offs and counterclaims it may have against you, directly with you, and not set up any thereof against your assignee, you hereby agreeing to remain responsible therefor; no waiver or change in this mortgage or related note, shall bind such assignee unless in writing signed by one of its officers. Upon full payment of this mortgage, assignee may deliver all original papers to you for Mortgagor. No oral agreement, guarantee, promise, representation or warranty shall be binding. Mortgagor waives all exemptions and homestead laws and acknowledges receipt of a true copy hereof. If any part hereof is contrary to, prohibited by or deemed invalid under the applicable laws or regulations of any jurisdiction, such provision shall be inapplicable and deemed omitted but shall not invalidate the remaining provisions hereof.

T. J. WILSON

(Signature of Individual or name of Corporation
or Partnership)

By /s/ T. J. Wilson

Signature of Buyer-Mortgagor

59a.

Title OWNER

(If Corporation have signed by President, Vice-President or Treasurer and give official title. If Owner or Partner, state which)

Witness

Witness

(Signature of Two witnesses, necessary only in the State of Texas)

ACCEPTED:

SUPERIOR MANUFACTURING CO.

By _____

Signature of Seller-Mortgagee

Title VICE PRESIDENT

(If Corporation, give official title.
If Owner or Partner, state which.)

ORIGINAL FOR FILING OR RECORDING

which said instrument of writing was then and there of the value of more than Fifty (\$50.00), and the property of T. J. WILSON, and the said BILLIE SOL ESTES did then and there obtain possession of and acquire the same as aforesaid, with the intent to appropriate the same to his own use, and with the intent of destroying and impairing (sic) the right of the said T. J. WILSON, the party justly entitled to the same in this, to-wit, the said BILLIE SOL ESTES did then and there falsely pretend and fraudulently represent to the said T. J. WILSON that the said T. J. WILSON by signing and executing said instrument of writing was purchasing the property specified and listed in said instrument of writing, to-wit:

75—500 GALLON SUPERIOR NH3 TANKS
MOUNTED ON AND TOGETHER WITH 75—
4 WHEEL SUPERIOR TANKS COMPLETE
WITH TIRES, AXLES, WHEELS AND HOSE
ASSEMBLIES.

SERIAL NO'S. SF-17214-500 THRU SF 17288-
500

65 — SUPERIOR NH3 APPLICATORS COM-
PLETE WITH REGULATORS, SHANKS,
KNIVES, HOSES, AND 65—200 GALLON
NH3 TANKS.

TANK SERIAL NO'S. 8304 THRU 8368,

and that the said property, as listed and specified in said instrument of writing, secured said instrument of writing and was the security thereon, and did thereby fraudulently induce the said T. J. WILSON, who relied upon said false pretenses and fraudulent representations and believed them to be true, to sign and place his, the said T. J. WILSON'S, signature on said instrument of writing and to deliver the possession of the said instrument of writing to him, the said BILLIE SOL ESTES, when in truth and in fact the said T. J. WILSON was not purchasing the property listed and specified in said instrument of writing, and said property did not secure said instrument of writing and was not security thereon, and the said BILLIE SOL ESTES then and there knew the said pretenses and representations were false; against the peace and dignity of the state.

LIBRARY

Office-Supreme Court, U.S.

FILED

NOV 17 1964

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 256

BILLIE SOL ESTES,

Petitioner

V.

THE STATE OF TEXAS

Respondent

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

WAGGONER CARR

Attorney General of Texas

HOWARD M. FENDER

Assistant Attorney General

GILBERT J. PENA

Assistant Attorney General

ALLO B. CROW, JR.

Assistant Attorney General

LEON DOUGLAS

State's Attorney

Attorneys for Respondent

The State of Texas

Capitol Station

Austin, Texas 78711



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 256

BILLIE SOL ESTES,

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THE STATE OF TEXAS

Respondent

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

**TO THE HONORABLE SUPREME COURT OF
THE UNITED STATES:**

Now comes the State of Texas, Respondent, and respectfully files this response in opposition to Petition for Writ of Certiorari.

OPINIONS BELOW

The opinions of the Court of Criminal Appeals of Texas are not yet reported and are printed herein in Appendix A. The original opinion affirming Petitioner's conviction was delivered on January 15, 1964. On March 11, 1964, the Court of Criminal Appeals of Texas overruled Petitioner's Motion for Rehearing. Petitioner's second motion for rehearing was denied without written opinion, but entered an order deleting a phrase from its opinion on rehearing. An Order Stay-

ing the Mandate was issued by the Court of Criminal Appeals on April 16, 1964.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on January 15, 1964. Petitioner's second Motion for Rehearing was denied without written opinion on April 15, 1964. The Court of Criminal Appeals of Texas stayed the issuing of its mandate on April 16, 1964. Petition for Writ of Certiorari was filed in this Court and this Court on October 12, 1964, requested Respondent to file a response to this Petition. The Petitioner has invoked the jurisdiction of this Court under Title 28, U.S.C.A., Section 1257(3). It is questioned by the Respondent that any substantial Federal question is presented for adjudication by the Supreme Court of the United States.

QUESTIONS PRESENTED

I.

Was Petitioner denied due process of law and equal protection of the laws under the Fourteenth Amendment of the United States Constitution by the Court's refusal to permit him to interrogate members of the grand jury, who returned the indictment, for the purpose of ascertaining bias, prejudice or pre-conceived opinions as to the Petitioner's guilt?

II.

Whether the Trial Court denied Petitioner due process of law and equal protection of the laws under the Fourteenth Amendment to the United States Constitution in permitting live television of the argument of State's counsel and the return of the jury's verdict

and its acceptance by the Court, where such live coverage did not disrupt, interfere, or in any way prejudice Petitioner's right to a fair and impartial trial and where no harm is shown by Petitioner?

III.

Whether the Trial Court denied the Petitioner due process under the Fourteenth Amendment of the United States Constitution in overruling his second motion for continuance and motion for change of venue, said motions having been made after the jury panel had been selected and after each juror had satisfied the Court that he could render a fair and impartial verdict if taken as juror in the case?

IV.

Whether the Trial Court and the Court of Criminal Appeals denied Petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States under the first count of the indictment, for swindling, when there was sufficient evidence to support the offense charged in the indictment in said count?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourteenth Amendment, Section 1, reads in part as follows:

"... nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

Article 339, Vernon's Annotated Code of Criminal Procedure

Qualifications

"No person shall be selected or serve as a grand juror who does not possess the following qualifications:

"1. He must be a citizen of the State, and of the county in which he is to serve, and qualified under the Constitution and laws to vote in said county; but, whenever it shall be made to appear to the court that the requisite number of jurors who have paid their poll taxes can not be found within the county, the court shall not regard the payment of poll taxes as a qualification for service as a juror.

"2. He must be a freeholder within the State, or a householder within the county.

"3. He must be of sound mind and good moral character.

"4. He must be able to read and write.

"5. He must not have been convicted of any felony.

"6. He must not be under indictment or other legal accusation for theft or of any felony."

Article 358. Vernon's Annotated Code of Criminal Procedure

Any person may challenge

"Before the grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard. Any person confined in jail in the county shall upon his request be brought into court to make such challenge."

Article 361, Vernon's Annotated Code of Criminal Procedure

Challenge to array

A challenge to the array shall be made in writing for these causes only:

"1. That those summoned as grand jurors are not in fact those selected by the jury commissioners.

"2. In case of grand jurors summoned by order of the court, that the officer who summoned them had acted corruptly in summoning any one or more of them."

Article 362, Vernon's Annotated Code of Criminal Procedure

Challenge to juror

"A challenge to a particular grand juror may be made orally for the following causes only:

"1. That he is not a qualified grand juror.

"2. That he is the prosecutor upon an accusation against the person making the challenge.

"3. That he is related by consanguinity or affinity to one who has been held to bail or who is in confinement upon a criminal accusation."

Article 374, Vernon's Annotated Code of Criminal Procedure

Deliberations secret

"The deliberations of the grand jury shall be secret. Any grand juror or bailiff who divulges anything transpiring before them in the course of their official duties shall be liable to a fine as for contempt of the court, not exceeding one hundred

dollars, and to imprisonment not exceeding five days."

Article 560, Vernon's Annotated Code of Criminal Procedure

On court's own motion

"Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue."

Article 566, Vernon's Annotated Code of Criminal Procedure

If adjoining counties objectionable

"If it be shown in the application or otherwise that all the counties adjoining that in which the prosecution is pending are subject to some valid objection, the cause may be removed to such county as the court may think proper."

Article 567, Vernon's Annotated Code of Criminal Procedure

Application may be controverted

"The credibility of the persons making affidavit for change of venue, or their means of knowledge, may be attacked by the affidavit of a credible person. The issue thus formed shall be tried by the judge, and the application granted or refused, as the laws and facts shall warrant."

STATEMENT OF THE CASE

Respondent denies each and every allegation of fact stated by Petitioner in his Petition except those facts supported by the record; and those facts specifically admitted by the Respondent.

Petitioner was convicted on his plea of not guilty in the Seventh Judicial District Court of Smith County, after a change of venue from Reeves County, for the offense of swindling under Chapter 16, Title 17 of the Texas Penal Code; his punishment was assessed at confinement in the penitentiary for a term of eight years.

The first count of the indictment, upon which Petitioner was convicted, alleged that Petitioner knowingly and by means of false pretenses and representations made to T. J. Wilson, induced Wilson to sign and delivered to him an instrument in writing of the value of more than Fifty (\$50.00) Dollars which conveyed and secured a valuable right. The instrument described was a chattel mortgage from T. J. Wilson to Superior Manufacturing Company on 75—500 gallons Superior N.H.3 tanks, and 75 4-wheel Superior tanks, complete with tires, axles, wheels and hose assemblies. Serial numbers were set out in the chattel mortgage. The chattel mortgage secured an indebtedness of \$121,850.00 on which there was a recitation of \$27,350.00 down payment, making a balance owed by Wilson in the sum of \$94,500.00, payable in monthly installments of \$1,575.00 each.

It was further alleged that Petitioner did falsely and fraudulently represent to Wilson that by signing and executing the instrument he was purchasing the property and that the said property was security for the instrument in writing; that Wilson relied upon

such representations, when in truth and in fact he was not purchasing the property and said property did not secure said instrument and was not security thereon.

T. J. Wilson, the injured party, testified that he went to Petitioner's office, and that Harold Orr, Vice President of the Superior Tank & Manufacturing Company, was present (S.F. 39). Wilson had talked to Petitioner before about a lease-back agreement, and told Petitioner that he was not interested. They finally agreed Wilson was to purchase the property and Petitioner was to lease it. The lease rate would be the monthly payments (S.F. 41), and Wilson was to receive ten per cent of the purchase price as a bonus (S.F. 41). At Petitioner's request Wilson furnished a financial statement and signed some in blank because Petitioner said he needed more than one, and some would be filled out on an electric typewriter (S.F. 42). Orr told him that Superior Tank & Manufacturing Company would give him a letter indemnifying him for any loss. Petitioner gave Wilson a similar letter and Petitioner was going to make the down payment of \$27,500.00. Petitioner was to give Orr a check and the injured party signed the chattel mortgage and other papers and returned them to Petitioner (S.F. 56). Petitioner and Orr told Wilson at the time that Wilson signed the chattel mortgage that the equipment was ready for delivery, and Wilson assumed it was at the Superior Tank & Manufacturing Company in Amarillo. Delivery was to be made to Hale County (S.F. 62). Wilson told him that he wanted the bonus in cash and not in products, therefore he received a check for \$7,500.00 from Petitioner as payment for his entering into the transaction (S.F. 63). He received the indemnification letter from Orr (S.F. 64, St.Ex. 16) and

Petitioner volunteered to fly Wilson to see the equipment (S.F. 73). Wilson believed the equipment listed in the mortgage was in existence, as represented and he would not have signed the chattel mortgage had he known there was no such equipment in existence (S.F. 67, S.F. 72). Petitioner agreed to make the monthly payments or have his bookkeeper make them for him (S.F. 74).

Wilson testified that the entire transaction would have been his inducement for his signing and delivering the chattel mortgage, and not any one factor, so far as he was personally concerned. This included the explanation of all the previous talks down to the payment on the equipment (S.F. 208).

Petitioner stated that he had already sold the paper contract (S.F. 263).

It was shown that the down payment was not made on the mortgage contract (S.F. 263).

The check, including the sum of this transaction, from C.I.T. to Superior Tank & Manufacturing Company, was introduced and went to Texas Steel Company in the sum of \$268,431.00 from Superior Manufacturing Company (S.F. 259). the check and proceeds were traced to Billie Sol Estes for \$268,431.00 (S.F. 263-270).

Harold Orr testified that he was president of Superior Manufacturing Company and that he, McSpadden, and others purchased the company. He further testified that Petitioner said that he knew they had purchased the company with one and a half million dollars in "bogus" paper and that Petitioner wanted McSpadden and Orr to handle "bogus" transactions

for him. (S.F. 313). The company was to handle contracts which contained fraudulent serial numbers (S.F. 316). Orr testified that Petitioner said that he wanted money for a down payment on grain elevators and that they worked together for some time. Later Petitioner wanted serial number plates (S.F. 344) and he asked that someone with a set of tools be sent to Pecos (S.F. 347). Further testifying, Petitioner said that he was taking an investigator around to see the equipment, and that they were changing serial numbers on tanks at Fabens and Anthony, Texas (S.F. 349). Orr met Wilson in Pecos and Petitioner wanted Wilson to purchase equipment from Superior and lease it back to Petitioner (S.F. 354). Petitioner then told Wilson that the equipment would be delivered to Hale County. Petitioner then signed the letter of guarantee and told Wilson that Superior would send them the same type of letter (S.F. 354), and that the equipment would be delivered that day or shortly thereafter (S.F. 356). Petitioner was to receive ten per cent as a bonus. Wilson signed the chattel mortgage, which was sent to C.I.T. On the contracts Superior received some \$75,000.00 and Wilson sent the money to Petitioner. There was no down payment on the merchandise (S.F. 375); the down payment part was false. Orr was aware that there was not to be a down payment (S.F. 377) as the property was never delivered (S.F. 379). Superior had never manufactured tanks with the serial numbers as set out in a chattel mortgage (S.F. 382). Different numbers were made up with the lease agreement signed in his presence (S.F. 404).

Petitioner did not testify nor offer any evidence in his behalf.

REASONS FOR DENYING WRIT OF CERTIORARI ARGUMENTS AND AUTHORITIES

I.

Petitioner was not denied due process of law by the Trial Court's refusal to permit his examination of the grand jurors as to bias and prejudice resulting from publicity.

The criminal procedure in the State of Texas regarding the examination of grand jurors is as follows:

Article 339, V.C.C.P., lists the qualifications of a grand juror, without any allusion to the matter of bias and prejudice.

Article 358, V.C.C.P., provides that before any grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard.

Under Article 361, V.C.C.P., a challenge to the array may be made that those summoned as grand jurors are not in fact those selected by the jury commission, or that the officer who summoned them acted corruptly in summoning any one or more of them. The grounds for challenge to a grand juror are set out in Article 362, V.C.C.P.; that he is not a qualified grand juror; that he is a prosecutor upon an accusation against a person making the challenge; that he is related by consanguinity or affinity to one who is being held on bail or who is in confinement upon a criminal accusation.

Article 374, V.C.C.P., provides that the deliberations of the grand jury shall be secret.

Under our statutes, bias or prejudice is not a specific ground for challenge of a grand juror in this State, and the Court did not err in refusing to permit Petitioner to examine the grand jurors with reference to such matters, prior to the return of the indictment. Article I, Section 10, Constitution of Texas, protects the right of an accused in all criminal prosecutions. We do not agree that it encompasses grand jury action or that such a construction given the statutes constitutes a denial of due process and equal protection of the law in violation of Article I, Section 10 of the Constitution of this State and in violation of the Constitution of the United States.

Beck v. Washington, 369 U.S. 541, 8th L.Ed.2d 98, 82 S.Ct. 955, cited by Petitioner, did not resolve this question and therefore is not controlling.

We do not agree that in (*Davis v. Texas*, 374 S.W.2d 242; *Carter v. Texas*, 39 Tex.Crim.Rep. 345, 48 S.W. 508 (1898)), the Texas Court by its decisions, despite the above statutes, permitted a challenge of the individual jurors upon the constitutional grounds for "bias and prejudice." The Court in those cases, in line with the Supreme Court of the United States, held that racial discrimination within the meaning of the Fourteenth Amendment in the selection of the grand jury panel renders void an indictment returned by such a body. In these cases motions were made to quash the indictments on the grounds of racial discrimination in the selection of the grand jury panel.

II.

Petitioner was not denied due process of law and

equal protection of the laws under the Fourteenth Amendment to the United States Constitution in permitting live television of the argument of State's counsel and the return of the jury's verdict and its acceptance by the Court, where such live coverage did not disrupt, interfere, or in any way prejudice Petitioner's right to a fair and impartial trial and where no harm is shown by Petitioner.

By Bills of Exception, Nos. 5 and 6, Petitioner complains of the Court's action in premitting live television of the trial and insists that the manner in which he was subjected to such public dissemination of his trial throughout the Nation both in and out of the presence of the jury, denied him due process of law under the Constitutions of this State and of the United States. He further contends that it was personally objectionable to Petitioner's counsel and that it violated Canon 35 of the American Bar Association Canons of Ethics. The Bills were qualified by the trial judge to show that the case was called September 25; that a live telecasting, radio broadcasting and press photography were permitted only on matters considered at that time, which was the motion not to allow telecasting, broadcasting or press photography, and the motion for continuance; that the only evidence offered was to prevent the telecasting, broadcasting by radio, and press photography; that the case was continued until October 22. Prior to the time of trial a booth had been constructed and placed in the rear of the courtroom of the same or near the color of the courtroom, with a small opening across the top for use of cameras.

That live telecasting and radio broadcasting were not permitted during the trial; that the only telecasting was on film without sound; that no broadcasting of the trial by radio was permitted; that the ABC.

NBC, CBS, and the television station in Tyler were allowed one camera each in the courtroom; that films were taken at different intervals during the day; that they were used later on regular newscasts; that the Court did not permit any cameras other than those that were noiseless; that there were no flood lights nor flashbulbs allowed to be used in the courtroom; that press photographers were not allowed inside the bar; that the Court did not permit any telecasting or photographing in the hallways leading into the courtroom on the second floor of the courthouse; that the Court did not permit live telecasting of arguments of State's counsel; that the arguments of Petitioner's counsel were not telecast or broadcast.

That there was not any televising at any time during the trial except from a booth in the rear of the courtroom during the argument of counsel. News photographers operated from the booth so that it would not interfere with nor detract from the attention of either the jurors or the attorneys.

That there was never at any time any radio broadcasting equipment in the courtroom; that there was some equipment in a room off the courtroom where there were periodic news reports given throughout the trial; that no witness requested not to be televised nor photographed while testifying, nor did any juror at any time make such request.

The State submits at the outset that Petitioner has shown no injury because of photographs being taken in the courtroom, nor has he shown any injury in the taking of photographs from the television booth; and it has not been shown that it affected the jury. Petitioner did not testify in the case nor offer any testimony, and it cannot be said that he or his witnesses

were burdened or hindered in any way by the presence of the cameras; there is no intimation in the record that a juror or witness was harmed or humiliated by reason of the telecast.

In *Ray v. State*, 221 S.W.2d 249, the Court of Criminal Appeals of Texas refused to speculate and presume injury to an accused where photographers took pictures of the defendant and the jury while the judge was out of the courtroom. Another case in which photographs were taken, and the case was televised is *Farrar v. State*, 277 S.W.2d 114. There the Court of Criminal Appeals of Texas refused to reverse a conviction because photographs were made of the appellant, his counsel, and the jury during the trial in the absence of an objection and showing of injury to appellant.

No other Texas case was found on the subject.

In *Hugh v. State*, 120 S.W.2d 24 (Supreme Court of Arkansas), appellant's counsel objected to the taking of a picture in the courtroom of appellant. The Court states, "I have already told him he could take the picture, but no one is required to have his or her picture taken, and the taking of picture has nothing whatever to do with the trial." The objection was overruled. The Supreme Court of Arkansas states, "... It was not shown to the jury, and if published in the newspapers, it did not reach the jury because the papers were excluded from them."

Associate Justice Frank H. Hall of the Supreme Court of Colorado, in an article entitled "*Colorado's Six Years Experience Without Judicial Canon 35*" in 48 American Bar Association Journal 1120, December.

1962, relates how no harm has been done by the use of the television and photographs in the courtroom.

In *20 Texas Bar Journal* 438, an article appears, "*A Free Trial v. The Free Press*," by Herbert Brucker, Editor, Hartford Courant, wherein it is stated, "Indeed, you cannot have either a fair trial or a free press without the other. Unless we have fair trials, we shall not long have a free press. Unless we have a free press we shall not long have fair trials." He pointed out that Mr. Justice Holmes said in *Abrams v. The United States*, in 1919, "Time has upset many fighting faiths. We do best when we let all faiths and all facts—imperfect though they may be, out into the open." "

See 35 Texas Law Review 429.

In *People v. Jelke*, New York Appellate Division, 130 N.Y.S.2d 662, the Supreme Court, Appellate Division, recognizes the inherent right of a judge to control the conduct of a trial over which he is presiding, the power to prevent disorder in the court and to exclude particular individuals, if good order requires it, or to clear the courtroom of spectators for a limited time when necessary to preserve order; however, the court held that the judge abused his discretion when he barred the press and the public from a courtroom during the presentation of the state's evidence. The court held that it was error for the judge to bar the press and to attempt to dictate what portion of the court proceedings should be made available to the public.

There is no showing in the present case that the jury knew the proceedings were being photographed by the television cameras. Assuming that they knew photo-

graphs were being taken by television cameras, they could not have known what was shown to the public, because in Texas jurors were kept together over night in felony cases.

If they had seen any of the proceedings on the newscasts, certainly Petitioner's able counsel would have that before this Court. How could Petitioner have been injured? Unless there was adverse publicity shown by the record to have infected the trial, making Petitioner's trial a meaningless formality, there is simply no basis for holding that Petitioner was denied due process. Here, of course, neither the filmed portions or the live broadcast was shown to the jury.

Pictures are of public interest. In this case they were shown to the public at intervals during the trial. Newspaper reports are given to the public at intervals during the trial. Neither was seen by the jury. How could either or both affect a verdict? Such has not been shown by Petitioner.

The Judicial Section of the State Bar at its annual Judges' Conference held in Brownsville in September, 1963, adopted a resolution concerning courtroom photography to the effect that control of trial coverage by various news media should be left to the trial courts; that they have the inherent power to exclude or control coverage in the proper case in the interest of justice. Bulletin, State Bar of Texas, Vol. 1, No. 1, October, 1963.

III.

Petitioner was not denied due process of law and equal protection of laws under the Fourteenth Amendment of the United States Constitution when the Court overruled his second motion for continuance and mo-

tion for change of venue, said motions having been made after the jury panel had been selected and after each juror had satisfied the Court that he could render a fair and impartial verdict if taken as juror in the case.

Petitioner complains, without suggestion from him as to where the case should be sent, that the Trial Court erred in overruling his Motions for Postponement and Change of Venue from Smith County to some other county in the State because of the widespread publicity which the case had received, thereby forcing him to accept jurors who, through radio, television, and other news media, had received inadmissible evidence which was not offered at the trial. In support of his contention, Petitioner introduced a list of exhibits which illustrate the State-wide publicity which the case had received and which showed that it was highly improbable that a jury selected from any one of the 254 counties in the State of Texas, would not have heard of Petitioner and his business ventures. While recognizing this problem Petitioner does not offer any plausible solution to the problem. Should he have not been tried merely because of his prominence and notoriety?

Petitioner's Motions for Postponement and Change of Venue were controverted by the State through its District Attorney and the affidavits of two citizens of Smith County who swore that in their opinion Petitioner could receive a fair and impartial trial in Smith County.

This cause was transferred from Reeves County to Smith County on July 23, 1962.

This cause was set for trial on September 24, 1962.

in Smith County. Upon Petitioner's motion, a postponement or continuance was granted until October 22, 1962. So that, in fact, his motion for postponement was a second motion, the case having been postponed by the Court on the motion of Petitioner, because of the absence of witnesses.

A motion for continuance on the grounds stated by Petitioner, is not a statutory motion but is addressed to the sound discretion of the trial judge. *Trapper v. State*, 84 S.W.2d 726; *Gordy v. State*, 268 S.W.2d 126; and *McIntyre v. State*, 360 S.W.2d 875.

No abuse of discretion by the Trial Court is shown.

For the situation where television publicity and newspaper publicity are asserted as grounds for continuance, see 39 A.L.R.2d 1342.

Petitioner insists that the Court's action in overruling his motion for change of venue presents error because the voir dire examination of the jurors reveals that nine members of the jury had read in newspapers and magazines and had heard on radio and television, purported facts about the case which would have been inadmissible upon the trial.

Respondent respectfully submits that the voir dire examination discloses that none of the jurors was shown to have formed any opinion about the case that would influence their verdict. In the absence of such a showing they were not disqualified. *Herring v. State*, 302 S.W.2d 428; *Klinedinst v. State*, 265 S.W.2d 593; *Pugh v. State*, 186 S.W.2d 258.

Petitioner strongly relies on *Williams v. State*, 283 S.W.2d 239. In its opinion the Court of Criminal Appeals of Texas held as follows:

"The opinion in *Williams v. State*, supra, cited by appellant, is not to be construed as holding that a court is required to change venue in every case where some of the jurors have read or heard purported facts about the case which would be inadmissible upon the trial. The holding in the *Williams* case is confined to facts presented in that case, where we held it error to deny a change of venue. To reverse for failure to change venue it must be shown that prejudice reached the jury box. *Everett v. State*, 218 S.W.2d 471; *Jones v. State*, 243 S.W.2d 848; *Johnson v. State*, 244 S.W.2d 235; *Goleman v. State*, 247 S.W.2d 119; *Aaron v. State*, 275 S.W.2d 693; *Slater v. State*, 317 S.W.2d 203; *Moon v. State*, 331 S.W.2d 312; *Philpot v. State*, 332 S.W.2d 323.

"There is no such showing in the present case. No error is presented in the bill."

In *Williams v. State*, supra, wherein the facts were not discussed, the Court of Criminal Appeals stated that at least five members of the jury had read newspaper accounts of appellant's connection with the crime for which he was tried; that the nature of the news accounts must be specifically noted; that he did not testify. The newspaper accounts, three of them in the county of the trial, plus the Houston newspapers, were read; that the prospective jurors learned that appellant was an unemployed ex-convict who had been out of the penitentiary only five months; that in addition to confessing to the instant crime, he had confessed that, within two months prior to the commission of the crime, he had raped a 47-year-old grandmother and robbed her of \$140; that he had been indicted for these other offenses; that he had been taken out of town by the officers while a large crowd had gathered at the jail; that the sheriff had stated, "It looked bad for a

while"; that sentiment was running high in Bay City and the sheriff had requested the newspaper not to publish the picture of appellant; that he was denied bail and he was being kept in an unidentified jail outside the county; that there had been many prowlings and peepings reported in the area where the two rapes had occurred; that the press considered the case against appellant one of the most vicious in recent Texas history; that none of these facts contained in newspaper accounts was admissible; that at least five members of the jury read such accounts prior to going into the jury box.

It should be pointed out that Williams was a Negro; accused of the rape of a white child, who was 14 years of age; that she was baby sitting with her sister's children; that the prosecutrix lived in a county of 23 or 24 thousand people; that she was a well-loved child in Matagorda County; that the sheriff had taken appellant to Wharton, and some people learned where he was; that the sheriff moved him to Richmond in Fort Bend County, and to Bay City only on the morning of the trial; that Bay City Tribune had a circulation of approximately 3,600; that the Houston Chronicle reported some of the articles. Mr. Russ Parker, reporter for the Bay City Daily Tribune, heard a couple of times that appellant should be hung without being tried; that he had published an article that a large crowd had gathered at the jail and at least one was armed.

In the present case there is testimony that Smith County has approximately 100,000 people; that the county from which the case was transferred was over 500 miles away; that none of the prospective jurors knew the appellant; that the record shows that T. J.

Wilson, the injured party, was from Reeves County; that there is no testimony that any of the prospective jurors knew him; that none of the facts of the case would show that it would arouse the citizenry to prejudge a case prior to its being transferred.

It would appear in the *Williams* case that there was probably a prejudice against the appellant and against him because of the crime alleged against him.

In the questioning of the voir dire in Smith County it is not shown that there was a prejudice against Petitioner because of the crime he had committed, for it was not known to the prospective jurors with what crime he was charged.

According to all of the clippings and the publicity given to the case, Petitioner is apparently contending that a fair trial could not be had in the State of Texas, and probably, in the United States, because of the publicity.

It should be pointed out that what the prospective jurors heard in the present case was not the purported facts in the case.

Petitioner does not show how many of the 87 jury panel had an opinion as to the guilt or innocence of the Petitioner.

For a reversal, prejudice must reach the jury box. *Slater v. State*, 317 S.W.2d 205; *Moon v. State*, 331 S.W.2d 312; *Aaron v. State*, 275 S.W.2d 693; *Johnson v. State*, 244 S.W.2d 235; *Jones v. State*, 243 S.W.2d 848; *Golemon v. State*, 247 S.W.2d 119. In *Everett v. State*, 218 S.W.2d 471, where practically all of the jurors had heard about the case and knew about the trial of another defendant in another trial and the

penalty assessed him, the jurors expressed opinions referring to the matter. A large number of jurors were examined. The special venire was exhausted and a second list of talesmen were brought before the jury; that the Court was unable to say, from a consideration of the entire proceedings, that the Trial Court abused its discretion in refusing to change venue.

In *Grace v. State*, 234 S.W. 541, the Petitioner was a Negro convicted for rape; his punishment was death. Some forty witnesses testified as to whether a fair trial could be had; there were a large number of newspaper accounts of the various stages of the progress of the case from its inception to the time of trial. The Court states that the newspaper articles appeared to be a fair statement of the facts as they transpired, were not inflammatory or written for the purpose of creating a prejudice against the accused, and that it was not presumed that a fairminded citizenship would necessarily become prejudiced against the accused by simply reading the accounts of the matter in the newspaper; that some of the persons had heard expressions unfavorable to the appellant; and the Court did not reverse the case.

Petitioner insists that the Court erred in overruling his challenge for cause of the veniremen, Robertson, Mallory, and Nutt, on the grounds that some had heard opinions expressed and felt they had opinions in the case. At no time did either state that such opinion would affect his verdict. Each stated that he could follow the law and the evidence submitted in the case.

Article 616, Sec. 13, V.C.C.P., provides:

"13. That from hearsay or otherwise there is established in the mind of the juror such a con-

clusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged; if he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged."

As heretofore pointed out, neither of these jurors stated that his opinion would influence his verdict.

The record and bills show that the opinion, if any, was from newspaper accounts, television reports; magazine articles; and other hearsay about Billie Sol Estes, and not this particular case. Each stated that he could follow the evidence and the Court's charge.

The statute provides that under such circumstances "... the court, in its discretion, may admit him as competent to serve." There is no showing that the Trial Court abused its discretion.

In *Howell v. State*, 352 S.W.2d 110, a juror stated that he had an opinion as to the guilt or innocence of accused, but could lay aside anything he heard and decide the case from the evidence heard from the witness stand. This Court held that there was no showing

that the Trial Court abused its discretion in holding the juror qualified.

In *Pugh v. State*, 186 S.W.2d 258, the conviction was for the murder of a deputy sheriff. It was contended that error was committed in overruling a challenge for cause to the venireman Ray Nettles; the bill of exception showed that Nettles had formed some opinion from reading newspapers.

He states "... that if the evidence showed up like he read in the papers he would have that opinion still 'otherwise if there was other evidence it might do away with my opinion all together, I don't feel like I have any established opinion in my mind but naturally do have some kind of opinion as to the guilt or innocence of the defendant.' "

The bill in that case recited that he was forced to take objectionable jurors, two of whom had opinions in the case, and three others had heard facts and read accounts in papers.

Each one of the jurors selected in the case stated that any opinion he had was based upon newspaper accounts or mere hearsay; that each felt he could lay such aside and under an impartial verdict upon the law and the evidence, thus bringing themselves under Section 13 of Article 616, V.C.C.P.; that the admission of such jurors as competent to serve became a matter of discretion of the trial judge.

These prospective jurors who indicated that they had formed some opinion about the case stated that they could lay aside such opinion and follow the evidence and the Court's charge in rendering their verdict.

It is apparent that the Trial Court was satisfied that

each venireman who stated he had an opinion could lay the same aside and render a fair and impartial verdict upon the law and evidence. Under the record, no abuse or discretion is shown on the part of the Court in holding the veniremen qualified. *Burkhalter v. State*, 247 S.W. 529; *Pugh v. State*, 186 S.W.2d 258; *Kline-dinst v. State*, supra; *Howell v. State*, 352 S.W.2d 110.

Petitioner complains that the Trial Court erred in overruling challenge for cause on eight other jurors who heard some information about Petitioner prior to trial that was admissible and no evidence was offered about such information at the trial.

Petitioner does not raise by Bill of Exception or otherwise that the Court's overruling his challenge for cause of these jurors forced Petitioner to take an objectionable juror as is required by *Wolfe v. State*, 178 S.W.2d 274. No harmful error being alleged in the bill, there is nothing presented for review.

In *Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639, this court held as follows:

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.

"This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is suffi-

cient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. People of State of Illinois*, 123 U.S. 131, 8 S.Ct. 22, 31 L.Ed. 80; *Holt v. United States*, 218 U.S. 245, 31 S.Ct. 2, 54 L.Ed. 1021; *Reynolds v. United States*, supra.

"The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of the prisoner's life or liberty without due process of law.' *Lisenba v. People of State of California*, 314 U.S. 219, 236, 62 S.Ct. 280, 290, 86 L.Ed. 166. As stated in *Reynolds*, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily * * * raise the presumption of partiality. The question thus presented is one of mixed law and fact * * *.' At page 156 of 98 U.S. 'The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * *. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' At page 157 of 98 U.S. As was stated in *Brown v. Allen*, 344 U.S. 443, 507, 73 S.Ct. 397, 446, 97 L.Ed. 469, the 'so-called mixed questions of the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore the duty of the Court of Appeals to independently evaluate the voir dire testimony of the impaneled jurors."

IV.

Whether the Trial Court and the Court of Criminal Appeals denied Petitioner due process of law under the Fourteenth Amendment to the Constitution of the United States under the first count of the indictment,

for swindling, when there was sufficient evidence to support the offense charged in the indictment in said Court.

The first count of the indictment in this case alleges that the Petitioner by false pretext induced T. J. Wilson to part with the written instrument (chattel mortgage) set out in the indictment, which was the property of T. J. Wilson and had a value in excess of \$50.00. Petitioner contends that State's Exhibit No. 15, (chattel mortgage) for a number of reasons, was not binding on T. J. Wilson as maker, and, therefore, the instrument had no value. The record clearly reflects that the chattel mortgage contract in question obligated T. J. Wilson to pay the sum of \$94,500; that after he signed the same it was retyped at the direction of Orr and that Orr, upon instructions of Petitioner, signed or forged the name of T. J. Wilson to the retyped and corrected instrument and as retyped, sold by Superior Manufacturing Company to C.I.T. Corporation for \$70,275. Such instrument was shown to have a value in excess of \$50.00.

The instrument signed by T. J. Wilson obligated him to pay a large sum of money for property which did not exist, but which was mortgaged to secure the debt, which was of the value of over \$50.00.

Respondent respectfully avers that Petitioner has been afforded all the aspects of due process of law and that his conviction does not violate the Fourteenth Amendment or any other requirement of the United States Constitution.

CONCLUSION

Respondent respectfully submits that the Petitioner has not raised a substantial Federal question, that his allegations lack merit; that they have been reviewed by the highest state court having criminal jurisdiction and fully refuted by the law and that for the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Allo B. Crow, Jr., Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that copies of the foregoing brief have been forwarded by United States Mail, First Class, Postage Prepaid, to Mr. Hume Cofer and Mr. John D. Cofer, Attorneys for Petitioner, 1408 Capital National Bank Building, Austin, Texas. 8

ALLO B. CROW, JR.
Assistant Attorney General

APPENDIX A

Opinions Below

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

No. 36,086

BILLIE SOL ESTES,

Appellant.

vs.

STATE OF TEXAS,

Appellee.

Appeal from Smith County

OPINION

The conviction is for swindling; the punishment, eight years' confinement in the penitentiary.

Trial was in the 7th Judicial District Court of Smith County, upon a change of venue from the 143rd Judicial District Court of Reeves County, on the court's own motion.

The indictment contained four counts, count 1 charging the offense of swindling; count 2, the offense of theft and counts 3 and 4, the offense of theft by bailee.

Upon the trial, counts 1, 2, and 3 were submitted to the jury, the state having abandoned count 4.

Count 1, under which appellant stands convicted, alleged, in substance, that on or about the 2nd day of March, 1961, the appellant did knowingly and by means of false pretenses and representations made to T. J. Wilson, induce Wilson to sign and deliver to him an instrument in writing of the value of more than \$50,

which conveyed and secured a valuable right. The instrument set out in the indictment was a chattel mortgage from T. J. Wilson, as buyer and mortgagor, to Superior Manufacturing Company on:

"75—500 GALLON SUPERIOR NH3 TANKS MOUNTED ON AND TOGETHER WITH

"75—4 wheel SUPERIOR TANKS COMPLETE WITH TIRES, AXLES, WHEELS AND HOSE ASSEMBLIES.

"SERIAL NO'S. SF-17214-500 THRU SF-17288-500

"65—SUPERIOR NH3 APPLICATORS COMPLETE WITH REGULATORS, SHANKS, KNIVES, HOSES, AND 65-200 GALLON NH3 TANKS.

"TANK SERIAL NO'S. 8304 THRU 8368,"

for which, according to the terms of the mortgage, the mortgagor agreed to pay the sum of \$121,850, the sum of \$27,350 having been paid, leaving a balance owing by Wilson of \$94,500, payable in monthly installments of \$1,575 each.

It was alleged that appellant did falsely and fraudulently represent to Wilson that by signing and executing the instrument he was purchasing the property and that the said property was security for the instrument in writing; that Wilson relied upon such representations, when in truth and in fact he was not purchasing the property and said property did not secure said instrument and was not security thereon.

T. J. Wilson, called as a witness by the state, testified that he lived in Pecos and was engaged in the business of farming; that in January, 1961, appellant approached him relative to his using his (Wilson's)

credit in purchasing fertilizer tanks and applicators and leasing them back to appellant; that appellant offered him 10% of the purchase price as a bonus rental and asked Wilson to furnish him with a financial statement; that he furnished the financial statement and later left word at appellant's office that he was not interested in the proposition; that later, on March 7, 1961, he went to the appellant's office in Pecos, at which time Harold Orr, vice-president of the Superior Tank & Manufacturing Company, of Amarillo, was present; that appellant introduced him to Orr and after some discussion he told appellant he was not interested in the transaction; that appellant then stated he would make the down payment and would be liable for the entire purchase price of the equipment, and Orr stated he would give a letter from the Superior Manufacturing Company holding the witness harmless in the event appellant did not make the payments, and appellant stated he would give a like letter.

Wilson stated that, thereupon, it was agreed that he would purchase the equipment, and appellant handed him a chattel mortgage which he signed and delivered back to appellant. State's exhibit #15, upon being identified by the witness as the mortgage which he signed and delivered to appellant, was introduced in evidence. The mortgage which had been duly filed in the office of the county clerk was a mortgage executed by Wilson to Superior Manufacturing Company on the equipment described in the indictment, reciting a purchase price of \$121,850, with a down payment of \$27,350 and balance due of \$94,500, payable in monthly installments of \$1,575 each.

Wilson further testified that at the time he signed

and delivered the mortgage to appellant he received a check from him for \$7,500 as payment for his entering into the transaction. He further testified that he signed the mortgage because of the representations made to him by appellant; that he was told that the equipment was ready for delivery and would be delivered the next morning in Hale County; that he believed the equipment listed in the mortgage was in existence, as represented; and that he would not have signed the mortgage had he known there was no such equipment in existence.

It was shown that no down payment was made on the mortgage contract. It was further shown that a check from C.I.T. Corporation, dated March 10, 1961, was issued to Superior Manufacturing Company in the amount of \$268,431.76, for the purchase of four contracts, including the Wilson contract which was purchased for \$70,275, and that the proceeds of a check issued by Superior Manufacturing Company on March 13, 1961, in the amount of \$268,431.76, covering the four contracts, found its way into the bank account of appellant in Pecos, Texas, on March 15, 1961.

Harold Orr, called as a witness by the state, testified that he was president of the Superior Manufacturing Company and that he and his company had an arrangement with appellant whereby the company would sell equipment on bogus contracts containing fraudulent serial numbers and send the proceeds of such sales to appellant. Orr testified that in the transaction with the state's witness Wilson, it was represented that the tanks would be delivered that day or the next and that in the transaction Superior Manufacturing Company received \$70,250 from C.I.T. Corporation, which money was sent to appellant. He further swore that the prop-

erty and equipment purchased by Wilson was never delivered; that, in fact, such property was never in existence; and that the company never manufactured any tanks having serial numbers indicated in state's exhibit #15. He stated that such numbers were "made up" and that, in fact, there was no such equipment.

Appellant did not testify and, other than certain exhibits introduced, offered no evidence in his behalf.

Appellant urges six points of error in support of his contention that certain actions and rulings of the court denied him a fair trial and due process of law under the Constitution of this State and the United States.

We shall discuss the contentions in the order in which the same were presented at the trial.

Presented by bystanders' bill of exception #1 and formal bill of exception #2, appellant's first contention is that the District Court of Reeves County erred in refusing to permit him to interrogate the grand jurors after they were impaneled and before they returned the indictment, as to their bias and prejudice against him because of widespread publicity given his case by the news media, and in later overruling his motion to quash and dismiss the indictment because of publicity in the case which, it is charged, denied him a fair and impartial hearing before the grand jury.

It is the appellant's contention that the court's action in refusing to permit his examination of the grand jurors as to bias and prejudice constituted a denial of due process and equal protection of the law.

Art. 339, V.A.C.C.P., lists the qualifications of a grand juror, without any allusion to the matter of bias and prejudice.

Art. 358, V.A.C.C.P., provides that before any grand jury has been impaneled, any person may challenge the array of jurors or any person presented as a grand juror. In no other way shall objections to the qualifications and legality of the grand jury be heard.

Under Art. 361, V.A.C.C.P., a challenge to the array may be made that those summoned as grand jurors are not in fact those selected by the jury commission, or that the officer who summoned them acted corruptly in summoning any one or more of them. The grounds for challenge to a grand juror are set out in Art. 362, V.A.C.C.P.: that he is not a qualified grand juror; that he is a prosecutor upon an accusation against a person making the challenge; that he is related by consanguinity or affinity to one who is being held on bail or who is in confinement upon a criminal accusation.

Art. 374, V.A.C.C.P., provides that the deliberations of the grand jury shall be secret.

Under the statutes, bias or prejudice is not a ground for challenge of a grand juror in this state, and the court did not err in refusing to permit appellant to examine the grand jurors with reference to such matters, prior to the return of the indictment against him.

We do not agree that such a construction given the statutes constitutes a denial of due process and equal protection of the law in violation of Art. 1, Sec. 10, of the Constitution of this State and in violation of the Constitution of the United States.

In *Beck v. Washington*, 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955, cited by appellant, the Supreme Court did not hold that under the due process clause of the Fourteenth Amendment a state was required to furnish to an accused an unbiased grand jury but spe-

cifically stated that such was a question "upon which we do not remotely intimate any view . . ."

Error is urged by appellant in his bystanders' bill of exception #3 to the action of the District Court of Reeves County in changing venue of the cause, on its own motion, to Smith County.

The bill of exception and record reflect that prior to ordering the change of venue, a jury panel of thirty-two names had been selected in the trial of another criminal case then pending against appellant in said court. At such time, appellant asked permission to withdraw his announcement of ready and moved the court to pass the case until such time as conditions in the county resulting from publicity should abate. Thereupon, the court discharged the jury panel and announced his tentative decision to transfer the case and three other causes pending against appellant to Smith County.

Appellant filed his opposition to such a change of venue and attached the affidavits of three citizens of Smith County, which is more than five hundred miles from Reeves County, who swore that he could not get a fair and impartial trial in that county.

After a hearing in which the three compurgators testified in opposition to the change of venue, the court entered its order changing venue in the instant case and in three other cases pending against appellant—~~all~~ upon new indictments that had been returned by the grand jury—to Smith County, which order recited that it appeared to the court that a trial, alike fair and impartial to the accused and to the state, could not be had in Reeves County because the case had received such widespread publicity in the county and because

of the special knowledge and information of the citizens of the county resulting from Reeves County being the residence of both the appellant and the state's witnesses. The court further found and recited in the order that the courthouse of Loving, being the nearest to the courthouse in Reeves County, was subject to the same objection; that a fair and impartial trial to the accused and to the state, alike, could not be had in that county; and that said condition existed in all other counties adjoining Reeves County and in the adjoining judicial districts.

The order entered by the court was in compliance with Arts. 560 and 566, V.A.C.C.P., which provide:

(Art. 560) "On court's own motion

"Whenever in any case of felony the judge presiding shall be satisfied that a trial, alike fair and impartial to the accused and to the State, can not, from any cause, be had in the county in which the case is pending, he may, upon his own motion, order a change of venue to any county in his own, or in an adjoining district, stating in his order the grounds for such change of venue."

(Art. 566) "If adjoining counties objectionable

"If it be shown in the application or otherwise that all the counties adjoining that in which the prosecution is pending are subject to some valid objection, the cause may be removed to such county as the court may think proper."

It has been the holding of this court that under these articles the district judge is vested with a discretion which, although it is judicial and not a personal one, will not be interfered with unless abused. *Mayhew v. State*, 155 S.W. 191; *Mills v. State*, 59 S.W.2d 147:

In *Spriggs v. State*, 289 S.W.2d 272, we said:

"There is perhaps no provision in our laws which places in the hands of a trial judge more inherent power than does this statute (Art. 560, supra), for he can exercise the authority there conferred when he is 'satisfied . . . from any cause' that a trial fair to the accused and to the state cannot be had in the county where the case is pending."

The record in the instant case, showing that before the court ordered venue changed on his own motion a jury panel had been selected in another case pending against appellant in Reeves County and discharged at his request because of widespread publicity in the county, demonstrates to us that the court did not abuse his discretion in changing the venue to Smith County.

By bills of exception #4 and #23, appellant complains of the court's action in overruling his motions, *made after the jury panel had been selected in Smith County to discharge the panel and postpone the case or change the venue.*

In the motions, appellant alleged that because of widespread publicity given to him and the case by the news media in Smith County, he could not receive a fair and impartial trial. It was alleged that of the sixty-one veniremen examined, all but six testified that they had read newspapers, followed television publicity, and received information from magazines and other sources as to matters of purported facts in the case which were not admissible at the trial. It was also alleged that of those selected on the panel, twenty-six members thereof testified that they had learned and received facts which were not admissible on the trial of the cause.

In support of such motions, numerous exhibits were offered, consisting of newspaper clippings and photo-

graphs concerning appellant and the case pending against him. Many of the newspaper clippings pertained to a grand jury investigation in Robertson County in connection with the death of one Henry Marshall, a United States Department of Agriculture employee, and connected appellant with the inquiry. Other articles dealt with the investigation of appellant's activities in Washington by congressional committees and the interest of both the President and the Attorney General of the United States in the investigation. Other newspaper articles dealt with the business dealings of appellant and his associates and criminal charges against them.

Appellant also called witnesses who resided in Smith County who testified that they had heard purported facts about the case on television and radio; that they had read purported facts about the case in the newspapers; and that they had heard the case discussed, and expressed the opinion that appellant could not receive a fair trial in the county.

The voir dire examination of the jury panel was adopted by appellant for purposes of the motion. Included in the record is the voir dire examination of thirty-two members of the panel. A reading of their voir dire examination reflects that most of them had read in newspapers or magazines or had heard on radio and television, including a telecast of the preliminary hearing on September 24 and 25, certain purported facts about the case, but each satisfied the court that he could lay aside any opinion he had formed about the case and render a fair and impartial verdict if taken as a juror in the case.

Appellant's motions for postponement and change of venue were controverted by the state through its

district attorney and the affidavit of two other citizens of Smith County who swore that in their opinion the appellant could receive a fair and impartial trial.

The motion for postponement was in fact a second motion, the case having been previously postponed by the court on motion of appellant, because of the absence of witnesses.

Such motion was not a statutory motion but was on grounds addressed to the discretion of the trial judge. *Trapper v. State*, 84 S.W.2d 726; *Gordy v. State*, 268 S.W.2d 126; and *McIntyre v. State*, 360 S.W.2d 875. A review of the record does not disclose an abuse of discretion by the trial court in refusing to postpone the case.

Appellant insists that the court's action in overruling his motion for change of venue presents error because the voir dire examination of the jurors reveals that nine members of the jury had read certain inadmissible facts about the case. Reliance is had upon *Williams v. State*, 283 S.W.2d 239, and to the rule stated in the syllabus, as follows:

"Where voir dire examination revealed that at least five members of the jury selected to try rape case had read newspaper accounts containing inadmissible facts, and after defendant had used all his challenges he was required to accept juror who had read the accounts, it was reversible error to deny motion for change of venue."

While the voir dire examination of the nine jurors discloses that they had read in newspapers and magazines and heard on radio and television certain purported facts about the case which would have been inadmissible upon the trial, none of the jurors were

shown to have formed any opinion about the case that would influence their verdict. In the absence of such a showing they were not disqualified. *Herring v. State*, 302 S.W.2d 428; *Klinedinst v. State*, 265 S.W.2d 593; *Pugh v. State*, 186 S.W.2d 258.

The opinion in *Williams v. State*, supra, cited by appellant, is not to be construed as holding that a court is required to change venue in every case where some of the jurors have read or heard purported facts about the case which would be inadmissible upon the trial. The holding in the *Williams* case is confined to facts presented in that case, where we held it error to deny a change of venue. To reverse for failure to change venue it must be shown that prejudice reached the jury box. *Everett v. State*, 218 S.W.2d 471; *Jones v. State*, 243 S.W.2d 848; *Johnson v. State*, 244 S.W.2d 235; *Golemon v. State*, 247 S.W.2d 119; *Affon v. State*, 275 S.W.2d 693; *Slater v. State*, 317 S.W.2d 203; *Moon v. State*, 331 S.W.2d 312; *Philpot v. State*, 332 S.W.2d 323.

There is no such showing in the present case. No error is present in the bill.

By bills of exception #8, 9, 12, 16, 17, 18, 20, 21 and 22, appellant insists that the court erred in overruling his challenge for cause to the veniremen Owens, Shapley, Johnson, Freeman, Conant, Betts, and Swann, all of whom appellant peremptorily challenged, and to the veniremen Robinson and Mallory, whom appellant was unable to strike (having exhausted his peremptory challenges) and who did serve on the jury, on the ground that all of the veniremen had formed opinions as to appellant's guilt, which would influence their verdict in the case.

Art. 616, V.A.C.C.P., enumerates the reasons for challenge for cause to any particular juror, and, in subdivision 13; provides:

"That from hearsay or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as will influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged; if he answers in the negative, he shall be further examined as to how his conclusion, was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged."

We have carefully read the voir dire examination of each of the above-named veniremen. Some stated that they had formed no opinion as to the guilt or innocence of appellant, while others stated that from reading newspaper accounts and magazines and watching television, they had formed some opinion about the appellant and his guilt or innocence.

Those prospective jurors who indicated that they had formed some opinion about the case stated that they could lay such opinion aside and follow the evidence and the court's charge in rendering their verdict.

It is apparent that the trial court was satisfied that each venireman who stated he had an opinion could lay the same aside and render a fair and impartial verdict upon the law and evidence. Under the record, no abuse of discretion is shown on the part of the court in holding the veniremen qualified. *Burkhalter v. State*, 247 S.W. 539; *Pugh v. State*, 186 S.W.2d 258; *Klinedinst v. State*, *supra*; *Howell v. State*, 352 S.W.2d 110.

By formal bills of exception #10, 13, and 14, appellant complains that the court erred during the voir dire examination in interrogating and instructing some of the veniremen with reference to their qualification as prospective jurors in the case. It is appellant's contention that by such action the court conveyed to the jurors his opinion in the case, in violation of Art. 707, V.A.C.C.P.

The bills reflect that during the voir dire examination the court inquired of some of the veniremen if they could lay aside any opinion they had formed about the case and base their verdict upon the law and evidence; inquired of some if they had any opinion as to the guilt or innocence of appellant; instructed some of the veniremen that the indictment was no evidence of guilt and that they would be so instructed in the charge; asked if they could follow the court's instruction and not consider the indictment as any evidence of guilt; and instructed the veniremen that the burden of proof was on the state and it must prove the defendant guilty beyond a reasonable doubt.

The bills further reflect that in each instance when the court made an inquiry or gave an instruction, the prospective juror was in doubt as to his answers given to certain questions propounded to him by counsel.

Under the record, the court was well within his province in questioning the jurors and explaining to them various phases of the law governing the case. In 35 Tex. Jur. 2d 149, Sec. 97; it is stated:

"... where the qualifications of a juror, and especially his mental attitude toward defendant, have been left in doubt by the examination of counsel, it is not only the right, but may also be the duty, of the judge to question the juror further."

See, also, King v. State, 64 S.W. 245.

We do not agree that the court's statements conveyed to the prospective jurors his opinion as to any phase of the case or the answers which they should give to the questions then being propounded to them.

By bills of exception #5 and 6, appellant complains of the court's action in permitting live television of the trial and insists that the manner in which he was subjected to such public dissemination of his trial throughout the nation, both in and out of the presence of the jury, denied him due process of law under the Constitution of this State and of the United States. It is contended that such action by the court required appellant to go to trial with the counsel of his choice, in violation of the ethical standards defined by Canon 35 of the American Bar Association, which seriously hampered counsel in the defense of appellant and denied to him full and adequate representation to which he was entitled under due process.

The bills of exception show that the case was first set for trial for September 24, 1962. On September 24 and 25, a hearing was held by the court on two motions filed by appellant. One motion was that no telecasting of the trial be permitted and the other was for a con-

tinuance. At the hearing, the court permitted live telecasting of the proceedings.

At the conclusion of the hearing, the court overruled appellant's motion that the trial not be telecast but granted the motion for continuance and reset the trial for October 22, 1962. On October 22, 1962, the case proceeded to trial on its merits.

Prior to the trial a booth was constructed and placed in the rear of the courtroom, painted the same color as the courtroom, with a small opening across the top for the use of cameras. During the trial, the court permitted telecasting of the proceedings by ABC, NBC, and CBS networks and KRLD television in Tyler, from the booth in the rear of the courtroom. Such telecasting was on film, without sound. The court did not permit telecasting in the hallway leading into the courtroom or on the second floor of the courthouse, where the courtroom was situated, in order that appellant and his attorneys would not be molested or harrassed in approaching and leaving the courtroom. No live telecasting of the proceedings was permitted by the court except the arguments of state's counsel and the return of the jury's verdict and its acceptance by the court. The arguments of appellant's counsel were not telecast, as requested by them. The bills certify that no juror or witness requested that he not be televised.

Under the facts certified, we fail to perceive any injury to the appellant as a result of the telecasting of the proceedings.

Appellant did not testify or call any witnesses, so it can not be said that he or his witnesses were burdened by the presence of cameras. There is no intimation in the record that any juror or witness was embarrassed or humiliated by reason of the telecast.

In *Ray v. State*, 221 S.W.2d 249, this court refused to speculate and presume injury to an accused where photographers took pictures of the defendant and the jury while the judge was out of the courtroom.

In *Farrar v. State*, 277 S.W.2d 114, this court refused to reverse a conviction because photographs were made of the appellant, his counsel, and the jury during the trial, in the absence of an objection *and showing of injury to appellant*.

The manner in which the trial judge permitted and controlled telecasting of the instant trial was well within the supervision and control of such coverage granted to him under Canon XXVIII of the Canons of Judicial Ethics since approved by the Judicial Section of the State Bar of Texas.

The contention that appellant was denied full and adequate representation, because of his counsel's belief in Canon 35 of the American Bar Association barring photographs in the courtroom or broadcasting or telecasting court proceedings, is not borne out by the record. Of the many cases coming to this court, we know of no case where the accused received better or more efficient representation than did appellant in the present case.

By points of error #7 and 15, appellant complains of other rulings made by the court during the trial and of the court's charge to the jury.

It is first urged that the court erred in not requiring the state to elect upon which count in the indictment it would go to the jury in seeking a conviction of appellant. While separate offenses were charged in the three counts, only one act or transaction was alleged.

that being the acquisition by appellant of the instrument in writing.

Under the general rule in this state, the state is not required to elect where the same act or transaction is charged in different counts of an indictment to meet possible variations in the proof. See: 30 Tex. Jur. 2d, Sec. 46, pages 617-620; Davis v. State, 321 S.W.2d 873; McKinnon v. State, 261 S.W.2d 335.

We do not construe Art. 1549, V.A.P.C., as amended in 1943, which provides:

“Where property, money, or other articles of value enumerated in the definition of swindling, are obtained in such manner that the acquisition thereof constitutes both swindling and some other offense, the party thus offending shall be amenable to prosecution at the state's election for swindling or for such other offense committed by him by the unlawful acquisition of said property in such manner,”

as requiring the state to elect as to which offense it would prosecute but only permitting the state to elect as to whether it would prosecute for swindling or some other offense. Prior to the 1943 amendment of the statute the state had no right to elect but was required to prosecute for the other offense. Nor do we agree that an election was required, because under the court's charge appellant could be convicted under any of the three counts submitted upon the law of co-principals. Johnson v. State, 8 S.W.2d 121, and the other authorities cited by appellant in support of his contention that the state should have been required to elect, in view of the court's charge on principals, are not here applicable, because, in the cases cited separate transactions and offenses are shown.

The court did not err in refusing to require the state to elect, and fully protected the appellant in instructing the jury in his charge that they could convict him only on one count in the event they found him guilty.

In his point of error VIII, appellant urges a fatal variance between the fraudulent inducement alleged in the indictment (that Wilson was induced to sign and deliver the mortgage upon appellant's representation that he was purchasing the property and that said property was security for the mortgage) and the proof offered upon the trial when Wilson testified that the entire transaction and not any one factor was the inducement for his entry into the transaction. While Wilson did testify that it was the entire transaction, including the \$7,500 payment made to him and the representations of both appellant and Orr to him, which induced him to sign and deliver the mortgage, he swore positively that he signed the mortgage because of representations made to him by appellant that the property was ready for delivery and that he believed the property was in existence, as represented. In order to constitute swindling it is not necessary that the false pretense should be the sole inducement which moves the injured party to part with his property. 5 Branch's Ann. P.C.2d at p. 344, Sec. 2827; Blum v. State, 20 Tex. App. 578; McFarland v. State 75 S.W. 788; Noblitt v. State, 281 S.W. 849. A further claim of variance is urged by appellant because state's exhibit #15, introduced in evidence, bore a number: "5-601C (4-60)" in the left top corner of the instrument, which number was not set out in the indictment in copying the mortgage according to its tenor. Such variance was not fatal, as the number was not a material part of the instrument, proper, and it was unnecessary for the state to allege the number in the indict-

ment. 3 Branch's 2d, Sec. 1588; Anderson v. State, 161 S.W.2d 88; Pate v. State, 361 S.W.2d 875.

The further contention is made by appellant that state's exhibit #15, for various reasons, was not binding on Wilson as maker and therefore the instrument had no value. We need not discuss the reasons urged by appellant as to the invalidity of the instrument, as the record reflects that the chattel mortgage contract in question obligated Wilson to pay the sum of \$94,500 and that after he signed the same it was re-copied at the direction of Orr and, as re-copied, sold by Superior Manufacturing Company to C.I.T. Corporation for \$70,275. Such instrument was shown to have a value in excess of \$50.

Appellant's remaining points of error relate to the court's charge.

In his charge to the jury, the court defined the offense of swindling substantially as the same is defined in Art. 1545, V.A.P.C., and set out in the charge seven essential elements of the offense. While the court's definition omitted the words, "goods," "services," and "any other thing of value," found in the statute, such omission was not called to the court's attention and does not present reversible error. The court also fully charged the jury on the law of principals.

In paragraph 3 of the charge, the court submitted to the jury the issue of appellant's guilt under count 1 of the indictment and instructed the jury that if they believed from the evidence beyond a reasonable doubt that the appellant either himself or acting as a principal, as the term was defined for them, on the date alleged,

"by means of the alleged false pretenses, devices

and fraudulent representations specifically set out in the *first count* of the indictment, did then and there by means of said false pretenses, devices and fraudulent representations, if any, acquire from the said T. J. Wilson said instrument of writing with said signature affixed thereto, and you further believe, beyond a reasonable doubt, that said false pretenses, devices and representations, if any, were relied upon by T. J. Wilson, and did induce the said T. J. Wilson to sign and place his, the said T. J. Wilson's signature on the instrument of writing, alleged in the indictment, and did induce the said T. J. Wilson to deliver to him, the said BILLIE SOL ESTES, said instrument of writing with the intent to appropriate the said instrument of writing to the said BILLIE SOL ESTES' own use, and that said instrument of writing conveyed and secured a valuable right, and that said instrument of writing was then and there of the value of more than \$50.00 and was the property of T. J. Wilson, and the said BILLIE SOL ESTES did so acquire said instrument of writing by then and there falsely pretending and fraudulently representing to the said T. J. Wilson that he, the said T. J. Wilson, by signing and executing said instrument of writing was purchasing the property specified and listed in said instrument of writing, and that said property, as listed and specified in said instrument of writing, secured said instrument of writing and was the security thereon, then you will find the Defendant guilty of swindling as charged in the first count of the indictment and assess his punishment at confinement in the State Penitentiary for a term of not less than two nor more than ten years. Unless you so find, or if you have a reasonable doubt thereof, you will acquit the Defendant."

In paragraph 4, the court instructed the jury that if they believed from the evidence or had a reasonable

doubt thereof that appellant did not by means of the alleged false pretenses and devices induce Wilson to sign and place his name on the instrument or that the appellant did not make any false pretenses or representations to Wilson, or if they believed that appellant at the time of receiving the instrument had no intent to appropriate it to his own use and benefit, or if they believed that the said instrument of writing did not convey or secure a valuable right and that said instrument was not of the value of more than \$50, or if they believed that the instrument of writing was not the property of T. J. Wilson, they should acquit the appellant and say by their verdict, "Not Guilty."

In paragraphs 21-A, 21-B, 21-C, 21-D, 21-E, and 21-F, the court submitted certain affirmative defenses to the jury.

In paragraph 21-A, the jury were told to acquit appellant if they believed from the evidence or had a reasonable doubt thereof that when Wilson signed, executed, and delivered state's exhibit #15, he knew he was not purchasing the property specified therein.

In paragraphs 21-B, 21-C, 21-D, 21-E, and 21-F, the jury were told that if they believed from the evidence or had a reasonable doubt thereof that the sole reason or reasons for Wilson's signing state's exhibit #15 was the payment of \$7,500 by the appellant to him or because appellant executed and delivered to him his written contract of equipment lease covering the identical equipment described therein, or because Superior Manufacturing Company gave him a letter of indemnity, or because appellant promised to pay all installments to become due on state's exhibit #15, then to acquit him of the offense charged in count 1 of the indictment.

Appellant insists that the court erred in submitting such defensive issues upon the theory of "sole reason" for Wilson's signing state exhibit #15, rather than upon the theory of "inducing cause," as requested by him in his requested charges #3, 4, 5, 6 and 7. The requested charges would have instructed the jury to acquit appellant if they found that Wilson was induced to enter into the transaction and sign state's exhibit #15 because of the \$7,500 payment or certain other specified reasons but for which he would not have executed the same.

We are unable to agree that the theory upon which the court submitted the affirmative defenses was erroneous. The ultimate issue to be determined by the jury was whether the alleged false pretext was an inducing cause for Wilson's entering into the transaction. If there were other inducements which were the "sole reasons" for Wilson entering into the transaction, no offense was committed and appellant was entitled to an acquittal. This theory was given to him in the affirmative defenses submitted by the court.

In the cases relied upon by appellant, a defensive issue raised by the evidence was not submitted to the jury. Such is not the case at bar, because, as shown above, every affirmative defense raised by the evidence was submitted to the jury.

Complaint is made to the court's refusal to give certain defensive charges requested by appellant. We have examined each requested charge and find no reversible error in the court's action in refusing to give the same. Some of the charges would have been upon the weight of the evidence. Some were not called for by the evidence and the others were adequately covered

by the affirmative defensive issues submitted to the jury.

The court's failure to define the term "property," as defined in Art. 1418, V.A.P.C., does not present error. Under the indictment and court's charge the jury were required to find, before convicting, that appellant did by means of false pretenses and fraudulent representations acquire the *instrument of writing* set out in the indictment. A definition of "property" would not have aided the jury in passing upon the issue.

Nor did the court err in refusing to instruct the jury that the state's witnesses C. M. Wesson and Adam Garcia, both of whom were employees of appellant, were accomplice witnesses as a matter of law. While Wesson testified that, after the date of the alleged offense, at appellant's request and direction, he changed certain serial numbers on anhydrous tanks, and Garcia testified that he changed certain numbers under Wesson's direction, neither witness was shown to have had any knowledge of the representations made by appellant to the injured party, Wilson. The court correctly submitted to the jury the issue as to their being accomplices and did not err in refusing to instruct the jury that they were accomplices as a matter of law.

Finding the evidence sufficient to support the conviction, and no reversible error appearing, the judgment is affirmed.

DICE, Judge

(Delivered January 15, 1964)

Opinion approved by the court.

CONCURRING OPINION

In view of the fact that I prepared for the Court the opinion in *Williams v. State*, 283 S.W.2d 239, and because appellant relies so strongly upon such case, I deem it proper to make the following observations.

The record in *Williams* reflects that the case had received publicity only in Matagorda County newspapers and in the adjacent area. The offense was committed; the case tried in Matagorda County, and the jurors stated they had read newspaper accounts of the case, and the voir dire examination revealed that they did not enter the jury box with open minds. After the reversal by this Court with instructions to change the venue, *Williams* was again tried, this time in Wharton County (*Williams v. State*, 298 S.W.2d 590), and there was an absence of any showing that the Wharton County jury did not enter the jury box with an open mind.

Appellant contends, without any suggestion from him as to where the case should be sent, that the court erred in overruling his motion to change venue from Smith County to some other county in the State because of the widespread publicity which the case had received, and that he was thereby forced to accept jurors who, through news sources, had received inadmissible evidence which was not offered at the trial. The answer to this contention would seem to lie in the exhibits introduced by appellant which illustrate the state-wide publicity which the case had received and which would render it highly improbable that a jury selected from the citizenry of any of our 253 counties other than Smith, where he was tried, would not contain a sizable number who had heard of appellant and

his far-flung financial manipulations. Appellant's counsel seems to recognize this fact, because he states in his brief that "Probably no case in this state has ever received the publicity treatment that this case received during the spring, summer and fall of 1962." I quote further from his brief:

"The Saturday Evening Post, The Readers Digest, Time, Life all had feature stories upon the Estes story giving in detail his life history and the details of the alleged fraudulent transactions out of which this prosecution arose. Said story carried full photographs and illustrations of the defendant's alleged fabulous and fraudulent career.

The metropolitan papers throughout the country featured the story daily. Each day for weeks the broadcasts carried some features of the story."

He poses a dilemma, but does not offer a solution.

The wheels of justice must not stop merely because an accused is of such prominence that he and his alleged misdeeds have been publicized throughout the state. The Supreme Court of Louisiana was confronted with such a problem in *State v. Rini*, 95 So. 400. See also the recent case of *State v. Odom*, 369 S.W.2d 173, from the Supreme Court of Missouri in which the question is fully discussed. Venue should always be changed where the end sought to be accomplished may be achieved, as was done in the *Williams* case, but all those properly charged with crime must be tried and their guilt or innocence determined. From the record, it is apparent that nothing beneficial to appellant could be accomplished by changing venue countless times.

MORRISON, Judge

(Delivered January 15, 1964)

OPINION ON APPELLANT'S MOTION FOR REHEARING

This conviction was affirmed upon the opinion prepared by Commissioner Dice, approved by the three Judges of this Court. The Concurring Opinion sets out the further views of Judge Morrison.

The opinion prepared by Commissioner Dice is attacked upon numerous grounds.

The motion for rehearing first complains that we erroneously stated that Exhibit 15 pleaded in the indictment was purchased by C.I.T. Corporation for \$70,275.

We said: "- - - the record reflects that the chattel mortgage contract in question obligated Wilson to pay the sum of \$94,500 and that after he signed the same it was *re-copied* at the direction of Orr and, *as re-copied*, sold by Superior Manufacturing Company to C.I.T. Corporation for \$70,275 - - -."

The appellant correctly points out that the instrument signed by Wilson and set out in the indictment was re-typed to correct the description "75—500 gallon Superior NH 3 tanks mounted on and together with 75—4 wheel Superior tanks," by changing the last word, "tanks," to "trailers," and that Orr, upon the instruction of the appellant, signed or forged the name of Wilson to the re-typed and corrected instrument and it was this instrument that was sold to C.I.T. Corporation.

The fact that the instrument described in the indictment and signed by Wilson was not itself sold and delivered to the C.I.T. Corporation does not affect our conclusion that the instrument signed by Wilson which

obligated him to pay a large sum of money for property which did not exist, but which was mortgaged to secure the debt, was of the value of over \$50. Wilson's financial statement is in the record and he testified as to its accuracy. He testified that as he left appellant's office, after signing the instrument, he heard the appellant say: " - - - he had my paper sold to C.I.T. "

The appellant challenges our disposition of his bills of exceptions relating to the refusal of the court to permit him to interrogate the grand jurors in Reeves County.

We disclaim any intention of holding contrary to our prior decisions in *Davis v. State*, 374 S.W.2d 242, and other cases. Cognizance will be taken and relief afforded against the organization of grand juries under circumstances violative of the Constitution.

A grand jury previously impaneled had indicted the appellant. He was not in custody or under bond to await the action of the grand jury impaneled in May. He sought to interrogate the grand jurors for the May Term when they reassembled in July.

Our holding is that the appellant was denied no constitutional or statutory right by the court's refusal to permit him to interrogate members of said grand jury for the purpose of ascertaining bias, prejudice or preconceived opinion as to the appellant's guilt and exercising challenges.

The clear distinguishment between the case before us and *Davis v. State* is that in the *Davis* case evidence adduced at the hearing of the defendant's motion to quash the indictment supported his contention that the grand jury which indicted him was organized under circumstances violative of the Constitution. In the rec-

ord before us no violation of the Constitution in the organization of the grand jury which indicted the appellant is shown.

The appellant's complaint to our disposition of his Bills of Exception 4 and 23 relating to the trial court's refusal to discharge the jury panel and postpone the trial or grant a change of venue from Smith County is predicated, in a large measure, upon the holding of this Court in *Williams v. State*, 283 S.W.2d 239.

The opinion in the *Williams* case was distinguished both in the Court's original opinion and by its author in his Concurring opinion herein. It is the view of the writer that, insofar as it may be construed as requiring a change of venue because jurors must be accepted who have read newspaper accounts of the case containing inadmissible facts, the *Williams* case should be overruled.

We do not agree that the Supreme Court in *Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639, adopted or announced such a rule. In that case the Supreme Court said that the failure to accord an accused a fair hearing violates even the minimal standards of due process; that a fair trial in a fair tribunal is a basic requirement of due process; that the jurors' verdict must be based upon the evidence developed at the trial, and that the theory of the law is that a juror who has formed an opinion cannot be impartial. The Supreme Court qualified the latter statement as follows:

"It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in

the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies v. Illinois*, 123 U.S. 131, 31 L.Ed. 80, 8 S.Ct. 21, 22; *Holt v. United States*, 218 U.S. 245, 54 L.Ed. 1021, 31 S.Ct. 2, 20 Ann. Cas. 1138; *Reynolds v. United States (US)* supra.

"The adoption of such a rule, however, 'cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law.' *Lisenba v. California*, 314 U.S. 219, 236, 86 L.Ed. 166, 180, 62 S.Ct. 280. As stated in *Reynolds*, the test is 'whether the nature and strength of the opinion formed are such as in law necessarily - - - raise the presumption of partiality. The question thus presented is one of mixed law and fact - - -'.

- - - 'The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside - - -. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' - - - As was stated in *Brown v. Allen*, 344 U.S. 443, 507, 97 L.Ed. 469, 515, 73 S.Ct. 397, the 'so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge.' It was, therefore, the duty of the Court of

Appeals to independently evaluate the voir dire testimony of the impaneled jurors."

In *Irvin v. Dowd*, venue was changed to an adjoining county. In the case before us venue was changed to Smith County, more than five hundred miles from Reeves County where the indictment was returned. The venue was changed on the court's own motion, the court having found that in Reeves County and in all counties adjoining, and in adjoining judicial districts, a trial fair alike to the state and the defendant could not be had.

The holding in *Irvin v. Dowd* closely parallels the Texas Statute (Art. 616 (13) V.A.C.C.P.) which provides that the court, if satisfied that he is impartial and will render an impartial verdict, may in its discretion, admit as competent to serve in the case a juror who, from reading newspaper accounts, communications, statements or reports or mere rumor or hearsay has formed an opinion or a conclusion as to the guilt or innocence of the defendant where the juror states he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence.

Whether the trial judge abused his discretion in refusing to postpone the trial or change the venue from Smith County must be determined in the light of the fact that the trial was had more than five hundred miles from the county where the offense was allegedly committed and the indictment returned; the voir dire testimony of the impaneled jurors, and the fact that the newspaper accounts, telecasts, broadcasts and other hearsay upon which some of the jurors had formed an opinion were circulated generally throughout the state.

We find no support in the record for the contention made in the motion for rehearing: "Three of the jurors who actually served in this Estes case expressed opinions that defendant was guilty."

The appellant forcefully argues in favor of Canon 35, Canons of Judicial Ethics of the American Bar Association, and against the view that the supervision and control of broadcasting or televising of court proceedings shall be left to the trial judge who has the inherent power to exclude or control such coverage.

We are not called upon to pass upon the merits of Canon 35. It is not binding upon the courts of this state.

We remain convinced that the coverage of appellant's trial in the manner set out in our original opinion was not a violation of due process and equal protection of law or other constitutional safeguard.

We do not, as appellant suggests, hold that there is no county in Texas where the appellant could get a fair trial, nor do we agree with appellant's contention that he could not and did not get a fair trial in Smith County.

Remaining convinced that Judge Dice's opinion correctly disposes of the appeal, appellant's motion for rehearing is overruled.

WOODLEY, Presiding Judge

(Delivered March 11, 1964)

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Supreme Court of the United States

October Term, 1964

No. 256

BILLIE SOL ESTES,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

**ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS**

**BRIEF OF THE AMERICAN BAR ASSOCIATION
AS AMICUS CURIAE**

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Supreme Court of the United States

October Term, 1964

No. 256

BILLIE SOL ESTES,

Petitioner.

v.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS.

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

The American Bar Association files this brief as *amicus curiae* pursuant to the written consent of the parties submitted herewith.

Opinions Below

The opinions of the court below have not been reported. Relevant portions of the opinion of the Court of Criminal Appeals of Texas affirming petitioner's conviction, dated January 15, 1964, appear at R. 135-37. The full text, including the concurring opinion, is printed at pp. 1a-35a of the Petition for a Writ of Certiorari. The court's opinion of March 11, 1964 overruling petitioner's motion for rehearing is printed in part at R. 143 and in full at pp. 36a-42a of the Petition. Petitioner's second motion for rehearing was overruled April 15, 1964, without written

opinion (R. 144), but the court entered an order correcting a misstatement of the record in its prior opinion on rehearing (p. 43a of the Petition).

Jurisdiction

The judgment of the Court of Criminal Appeals of Texas was entered January 15, 1964 (R. 138). Petitioner's second motion for rehearing was overruled April 15, 1964 (R. 144). Petition for a Writ of Certiorari was filed on July 7, 1964 and granted on December 7, 1964 on a limited issue (R. 145). The jurisdiction of this Court was invoked under 28 U.S.C. § 1257(3).

Statutes Involved

There are no statutes or regulations directly involved. Petitioner's claim is based on an infringement of his rights under the Fourteenth Amendment to the Constitution which provides in pertinent part:

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Question Presented

This brief will discuss the following question to which certiorari has been limited:

Does the introduction of television into a State criminal trial, contrary to the principles of Canon 35 of the Canons of Judicial Ethics of the American Bar Association, over the objection of the defendant, violate the due process and equal protection clauses of the Fourteenth Amendment?

Interest of *Amicus Curiae*

The fundamental Constitutional issues which are to be reviewed in this case are of vital concern to the American Bar Association and its nearly 120,000 members. As a

national professional association of lawyers dedicated "to advance the science of jurisprudence" and "to apply its knowledge and experience in the field of the law to the promotion of the public good," the Association is interested in presenting to the Court its views on the nature of a criminal defendant's right to a fair trial and the impact of television thereon. The Association particularly wishes to set forth its reasons for respectfully urging the Court to reverse petitioner's conviction inasmuch as it believes that the Constitutional infirmity involved is reflected in the proscription of Canon 35 of its Canons of Judicial Ethics. Although the Canon does not have the force of law *proprio vigore*, the fact that nearly all of the States and the Judicial Conference of the United States have adopted it in one form or another indicates that the great majority of those responsible for the administration of justice have concluded that the right of fair trial is best preserved by the exclusion of television from the courtroom.

In filing this brief, the Association is not concerned with the question of the guilt or innocence of the petitioner nor with his record. The fact that he was a notorious person, subject to many criminal proceedings, makes him no less entitled to absolute fairness at his trial. The difficulty of assuring a fair trial to notorious or unpopular defendants is so great that they particularly need sturdy application of Constitutional protections.

The history of Judicial Canon 35 illustrates the development of the Association's position that the Canon embodies the Constitutional principles here involved. It was originally adopted on September 30, 1937 by the House of Delegates* in the following form:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photo-

* The House of Delegates is not only the governing body of the American Bar Association; because of the presence of representatives of all State Bar Associations, the largest and most important local bar associations, and of other important national professional groups, it is in fact a broadly representative policy forum for the profession as a whole.

graphs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." 62 A. B. A. REP. 1134-35 (1937).

A Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings had reported to the Association its grave concern with the dangers attendant upon the use of radio in connection with trials, particularly in light of the spectacular publicity and broadcast of the trial of Bruno Hauptmann.* The Committee specifically referred to the evil of "trial in the air".** 62 A. B. A. REP. 860 (1937).

After the adoption of Judicial Canon 35, the direct radio broadcasting of court proceedings was disapproved by the Association's Committee on Professional Ethics and Grievances in its Opinion No. 212, March 15, 1941, as being specifically condemned. The Committee quoted with approval the following statement of the Michigan and Detroit Bar Associations:

"Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and

* See *State v. Hauptmann*, 115 N.J.L. 412, 180 Atl. 809 (Ct. Err. & App.), *cert. denied*, 296 U.S. 849 (1935).

** Prior to the adoption of Judicial Canon 35, the impropriety of permitting radio broadcasts of court proceedings was recognized by the Committee on Professional Ethics and Grievances of the Association in its Opinion No. 67, March 21, 1932. The Committee had recourse to Judicial Canon 34 which provides that a judge should not administer his office "for the purpose of advancing his personal ambitions or increasing his popularity." The Committee found that radio broadcasting of a trial changes "what should be the most serious of human institutions either into an enterprise for the entertainment of the public or of one for promoting publicity for the judge." AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 163 (1957).

confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience. The fear expressed by most persons when facing an audience or microphone is a matter of common knowledge, and but few defendants or witnesses can properly concentrate on facts and testify fully and fairly when so handicapped. . . . Such broadcasts are unfair to the Judge, who should be permitted to devote his undivided attention to the case, unmindful of the effect which his comments or decision may have upon the radio audience." AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 426 (1957).

In 1952, the growing prominence of television as a medium of mass communication was dealt with in a report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings. 77 A. B. A. REP. 607 (1952). In condemning the practice of televising judicial proceedings, the Committee called attention to the fact that:

"The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become over-concerned with the impression their actions, rulings or testimony will make on the absent multitude." *Id.* at 610.

As a result of this report, and the recommendation of the Committee on Professional Ethics and Grievances, Judicial Canon 35 was amended by inserting a ban on the "televising" of court proceedings and inserting the descriptive phrase "distract the witness in giving his testimony" before the phrase "degrade the court". In addition, a second paragraph was added providing for the televising and broadcasting of certain ceremonial proceedings. *Id.* at 110-11.

In October, 1954, the Board of Governors authorized the appointment of a Special Bar-Media Conference Committee on Fair Trial-Free Press to meet with representatives of the press, radio, and television. The views of both sides were thoroughly explored and were presented in detail in the September, 1956 issue of the American Bar Association Journal.* After extensive joint debate, no solutions or agreements were reached. 83 A. B. A. REP. 790-91 (1958). The Committee did report that it was convinced that

"courtroom photographing or broadcasting or both would impose undue police duties upon the trial judge[,] . . . that the broadcasting and the photographing in the courtroom might have an adverse psychological effect upon trial participants, judges, lawyers, witnesses and juries[,] . . . [and] that partial broadcasts of trials, particularly on television, might influence public opinion which in turn might influence trial results. . . ." *Id.* at 645.

Following the presentation of the Bar-Media Conference Committee report and in connection with the consideration of a report and recommendation of a Special Committee of the American Bar Foundation, created in July, 1955 (83 A. B. A. REP. 643-45 (1958)), the House of Delegates conducted a hearing as a "Committee of the Whole" during its February, 1958 session at which proponents and opponents of Judicial Canon 35 were fully heard. 83 A. B. A. REP. 648-69 (1958). Thereafter, at the August, 1958 meeting of the House of Delegates, it was decided to have a Special Committee study Canon 35 and

"conduct further studies of the problem, including the obtaining of a body of reliable factual data on the experience of judges and lawyers in those courts where either photography, televising or broadcasting, or all of them, are permitted. . . . The fundamental objective of the Committee and of all others inter-

* 42 A.B.A.J. 834, 838, 843 (1956).

ested must be to consider and make recommendations which will preserve the right of fair trial." 83 A. B. A. REP. 284 (1958).*

The Special Committee filed an Interim Report and Recommendations with the House of Delegates in August, 1962 setting forth the "Area and Perspective" of its survey and studies. The report included portions of testimony by media representatives taken at a hearing held in Chicago on February 18, 1962, as well as a summary of the Committee's informal conference with certain representatives from Colorado and Texas. In addition, the report included written comments by officers of State Bar Associations responding to a Committee survey, and certain general correspondence received by the Committee regarding Judicial Canon 35. The report also listed significant publications favoring either revision or retention of the Canon. (Ten copies of this report have been filed with this brief for the convenience of the Court. It is cited hereafter as *Int. Rep.*)

The Special Committee thereafter submitted its final report and recommendations, concluding that the substantive provisions of Judicial Canon 35 remain valid and "should be retained as essential safeguards of the individual's inviolate and personal right of fair trial." (This report is reprinted as an Appendix hereto.) The Committee did recommend certain minor deletions (bracketed) and changes (italicized) which were adopted by the House of Delegates, after full debate, on February 5, 1963:

"The taking of photographs in the court room, during sessions of the court or recesses between sessions,

* The successive Chairmen of this Special Committee were Whitney North Seymour of New York, Richmond C. Coburn of St. Louis, and John H. Yauch of Newark, all of whom have been appointed by President Lewis F. Powell, Jr. as a special committee to prepare and file this brief, the filing of which was duly authorized by the Association's Board of Governors. On February 8, 1963 this action was approved by the House of Delegates. This committee has had the benefit of the assistance, in preparing this brief, of Gerald M. Levin of the New York Bar and of Roy G. Bowman of New York.

and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] *participants and witnesses* in giving [his] testimony, [degrade the court] and create misconceptions with respect thereto in the mind of the public and should not be permitted.”*

A vast majority of the states have voluntarily adopted Judicial Canon 35 in one form or another, and it has been embodied in principle in Rule 53 of the Federal Rules of Criminal Procedure. In a recent Resolution of the Judicial Conference of the United States, the philosophy of Canon 35 was unanimously reaffirmed:

“Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.” *Int. Rep.* p. 97.

* The full text of Judicial Canon 35, as amended, is as follows:

“IMPROPER PUBLICIZING OF COURT PROCEEDINGS

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.”

Since 1956, two states, Colorado and Texas, have, by court rule or practice, left to the discretion of individual judges the decision of whether to permit the broadcasting of trials.* The Colorado rule resulted from a report by Justice O. Otto Moore, as Referee, which was adopted by the Supreme Court of Colorado sitting en banc. *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P. 2d 465 (Colo. Sup. Ct. 1956). There the individual trial judge's discretion to allow telecasting is subject only to the objection of a witness or juror under subpoena but not to defendant's objection; but apparently, in practice, the Colorado courts now recognize that television should not be allowed in the courtroom unless the defendant consents. *Int. Rep.* pp. 19-20. Under the Texas practice, no witness may be photographed over his express objection, and the media must first obtain permission from the court. The right to object is evidently not afforded to the defendant. *Int. Rep.* p. 74; *Appendix* p. 21.**

Statement

The Association adopts Petitioner's Statement except insofar as it wishes to emphasize the following facts.

Petitioner was indicted for swindling under the Texas Penal Code (R. 1-7). After a change in venue, the case was first called on September 24, 1962 (R. 8). A hearing was held to consider petitioner's motion to prohibit telecasting and for a continuance, which lasted through September 25 and which itself was televised "live" (R. 19, 82), with commercial messages (R. 71, 85, 89-90). An edited "tape" of the first day's proceedings was shown that night on television in place of the evening movie, with the normal commercials being inserted periodically (R. 58, 87). The jury panel was called and sworn before the cameras (R. 59) on September 25 (R. 57).

* See also the Oklahoma practice referred to at p. 30, *infra*.

** See Judicial Canon 28, Canons of Judicial Ethics, Integrated State Bar of Texas, approved September 27, 1963 (Petition for Certiorari, p. 19 & pp. 50a-51a).

The motion to preclude telecasting was overruled (R. 54). The trial was continued until October 22, and in the interim, a local television station, with the approval of the court (R. 70), constructed a booth in the rear of the courtroom with an opening across the top providing access for camera lenses (R. 19). The opening argument for the State was televised "live", but because of transmission difficulties there was no picture (R. 20). The closing argument for the State was fully televised, with the cameras "directly trained" on the State's attorneys and the jury (R. 17). The return of the verdict by the jury and its acceptance by the court were also telecast (R. 20). At the request of petitioner's attorneys, the cameras were ordered not to be on them and the sound turned off while they addressed the jury (R. 134-35); instead, the cameras were directed at the judge and the arguments monitored by audio equipment and relayed by a news announcer (R. 17).

The rest of the trial was telecast on film, without sound, and used on newscasts later in the day (R. 20, 131). Radio broadcasts in the form of spot news reports were made from a room next to the courtroom, between a hall and the end of the jury box (R. 99-100).

Summary of Argument

The trial court deprived petitioner of his right to a fair trial under the due process clause of the Fourteenth Amendment by permitting the trial to be televised over his objection. Included within this right of fair trial are certain Sixth Amendment guarantees, the right to an impartial jury and judge, the right of confrontation, and the right to counsel, which must be safeguarded by the States as essential elements of fundamental fairness. The impact of television on each of the trial participants seriously interferes with the exercise of these fundamental rights.

By acceding to media requests in selecting petitioner for trial on television, the trial court deprived him of the equal protection of the laws. The fact of petitioner's notoriety cannot justify the prejudicial introduction of a

vast electronic audience into the courtroom while other defendants are spared this intrusion. The trial court, by refusing to follow the inhibitions also embodied in Judicial Canon 35, infringed the Constitutional principles of fair trial and equal protection which the Canon reflects.

The right to a public trial implies no Constitutional right of the television camera to be in attendance at court. This is a defendant's right, intended for his protection, not for what may be his undoing. Nor is there any right of free speech or press which might be violated by banning television from the courtroom. What is involved is not freedom of expression but simply the regulation of access to the courtroom by certain media equipment. The right of individual defendants and of the public to fair trial is too important to be subordinated to other interests.

ARGUMENT

I

Television in the courtroom denied Petitioner his right to a fair trial under the due process clause of the Fourteenth Amendment.

The due process clause of the Fourteenth Amendment guarantees the accused those fundamental rights which are essential to a fair trial. *Gideon v. Wainwright*, 372 U. S. 335, 340-41 (1963); *Powell v. Alabama*, 287 U. S. 45 (1932). Certain Sixth Amendment rights specifically safeguarded in federal court, because of their fundamental nature, also come within the ambit of Fourteenth Amendment protection and are therefore binding on the States. Each of these rights, the right to an impartial jury and judge, the right of confrontation, and the right to counsel, are necessarily impaired by the introduction of television into the courtroom. Each one of the trial participants, be he juror or judge, witness or lawyer, is so likely to be adversely affected by the camera's stare that he would be unable to function in a manner consistent with the requirements of fair trial.

A. The Right to an Impartial Jury

Although the States need not provide that all criminal trials be by jury, see *Turner v. Louisiana*, 33 U. S. L. WEEK 4137, 4139 (January 19, 1965); *Irvin v. Dowd*, 366 U. S. 717, 721 (1961); *Palko v. Connecticut*, 302 U. S. 319, 324 (1937), when a jury trial is provided, that jury must be impartial. *Irvin v. Dowd*, *supra* at 721-22 (newspaper publicity engendered atmosphere precluding an impartial jury); see *Moore v. Dempsey*, 261 U. S. 86 (1923) (mob domination prevented impartial trial); *cf. Rideau v. Louisiana*, 373 U. S. 723 (1963) (televised confession required change of venue). For example, this Court has recently held that the continual association of jurors and witnesses outside the courtroom so prejudices the jury as to "undermine the basic guarantees of trial by jury. . . ." *Turner v. Louisiana*, *supra* at 4140.

Thus, the right to an impartial jury means simply that a defendant is entitled to a fair verdict rendered by jurors unmarked by prejudice and outside influence. The presence of television in the courtroom precludes such a verdict.

Initially, potential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pre-trial hearings and motions from which the jury is ordinarily excluded. Evidence otherwise inadmissible may leave an indelible mark. In the case at bar, one of the jurors apparently saw the televised version of petitioner's motion to prevent telecasting and for a continuance. (Petition for Certiorari, p. 25.)

Once the trial begins, exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors' perspective. See Cantrall, *A Country Lawyer Looks at Canon 35*, 47 A. B. A. J. 761, 763 (1961).

Despite the court's injunction not to discuss the case, it seems undeniable that jurors will be subject to the pressure of television-watching family, friends and, indeed, strangers. "We lawyers know that unfortunately a word dropped outside the courthouse to a juror sometimes has more influence than the evidence itself." Tinkham, *The Bar and Canon 35*, 19 F. R. D. 19, 24 (1955). It is not too much to imagine a juror being confronted with his wife's television-oriented viewpoint. Tinkham, *Should Canon 35 Be Amended?*, 42 A. B. A. J. 843, 884 (1956). Additionally, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing strangers, or perhaps harried by intruding telephone calls. Possible loss of business or other economic injury is only one fear which may become fact because of involvement in an unpopular decision. See Letter from Peter H. Gerns, *Int. Rep.* p. 63.

The inhibiting effect on a jury which knows that the return of its verdict and its acceptance by the court will be carried across countless television screens (R. 20) is incapable of precise measurement. The very fact of television inevitably impresses on the jury that this particular trial is of some undefined special importance (R. 15). In such an atmosphere, it is virtually impossible for the court to establish appropriate safeguards to keep the jury unswayed by the force of public opinion and attentive to the evidence in the courtroom. See Letter from Herman S. Merrill, *Int. Rep.* p. 35. Mass opinion conveyed through the peering lens is surely "anathema to the very conception of a fair trial." Douglas, *The Public Trial and the Free Press*, 46 A. B. A. J. 840, 844 (1960).

Ultimately, television will preclude the rendering of an impartial verdict in those cases most in need of disinterested adjudication and most likely to be televised—the criminal trial of an unpopular or infamous defendant. Needless to say, the rights of all are secure only if the rights of the most detested are vindicated according to the rule of law.

B. The Right to an Impartial Judge

The trial judge plays a pivotal role in sustaining the atmosphere of impartiality mandated by the Sixth Amendment,* *cf. Glasser v. United States*, 315 U. S. 60, 82 (1942), and the Fourteenth. Thus, fundamental fairness requires that the presiding judge have no interest in the outcome of the trial. *Tumey v. Ohio*, 273 U. S. 510 (1926),

"Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." 273 U. S. at 532.

In addition, the trial judge cannot occupy a position adverse to the defendant. He cannot be, for example, complainant, indicter and prosecutor. *In re Murchison*, 349 U. S. 133 (1955). It is not necessary that actual bias be shown; due process precludes even the probability of unfairness.

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. *But our system of law has always endeavored to prevent even the probability of unfairness.* To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, *supra* at 136 (emphasis added).

This requirement of an impartial judge attending to the administration of the trial and adjudication of testimony.

* The right to an impartial judge derives from the Sixth Amendment right to a public trial by a fair and impartial jury, as well as from the broader due process provision of the Fifth Amendment. See, e.g., *United States v. Hill*, 332 F.2d 105 (7th Cir. 1964); *Riley v. Goddman*, 315 F.2d 232 (3d Cir. 1963); *cf. Baker v. Hudspeth*, 129 F.2d 779 (10th Cir.), *cert. denied sub nom. Baker v. Hunter*, 317 U.S. 681 (1942).

and argument without extraneous influence is incompatible with the distractions of television. There are severe pressures involved in the very decision to allow television admission, in policing the courtroom once access has been allowed, and in appearing as one of the prime actors in the televised drama. Judicial energies and deliberative capacity should not be thus diverted from the true business of the court—the fair trial and decision of the case at hand. To adhere to Lord Mansfield's classic standard of the impartial and independent judge:

"I wish popularity: but, it is that popularity which follows; not that which is run after. It is that popularity which, sooner or later, never fails to do justice to the pursuit of noble ends, by noble means. I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent, or the credulity of a deluded populace can swallow." *Rex v. Wilkes*, 4 Burrow's 2527, 2562 (K. B. 1770).

would be difficult, if not impossible, when the pressure of public opinion is brought to white heat by television.

It is apparent not only that individual judges should not have the discretionary power to introduce television into the courtroom, but that they should be protected from even having to consider the issue. Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A. B. A. J. 615, 616 (1962). Intense pressure from the media for full access is bound to affect the judge's outlook: if he decides not to allow television, he will be subjected to the charge of "discrimination," of being "old-fashioned," and of showing less concern for the public than fellow judges who have allowed it. *Id.* at 617. Disfavor of the media can, unfortunately, have a profound impact on the chances of re-election for a closed-circuit judge. *Ibid.*

see Letter from Judge Henry S. Stevens, *Int. Rep.* p. 39. Moreover, his manner of deciding not only whether to admit television but, once admitted, of disposing of the recurring requests to take certain pictures may often give the erroneous impression that he is preventing complete disclosure. See Letter from Judge John J. Walsh, *Int. Rep.* p. 62. On the other hand, the many rulings required once the courtroom door is opened may appear, if they are not in fact, affected by a sensitivity to media coverage and criticism. See R. 10.

If a judge is to bear the burden of policing the cameras, he can hardly avoid getting involved in all sorts of technical aspects of television, almost as if he were a part of the crew. As in the case at bar, he may have to instruct the television personnel not to "pick up" lawyer-client conferences (R. 49-50); he may have to make specific rulings regarding camera placement or angle (R. 52, 61, 77), as well as noise in the courtroom caused by camera equipment and personnel (R. 55); and he may have to pass on the plans for physically incorporating the equipment into the courtroom structure (R. 70). See also Letter from Judge Raymond W. Fox, *Int. Rep.* pp. 56-57 (pointing to example of trial judge who "forgot to turn off the sound when he was discussing a matter with the attorneys at the bench which should not have gone over the air").

Finally, there is the direct impact of appearing on stage as the center of television attention. "Some judges will be unable to forget that a million eyes are upon them." Griswold, *supra* at 616.

In sum:

"The recognition of the need of the power of the trial judge . . . to ban television . . . is in itself an admission of the potential danger. Why then risk the danger? Why make the judge divert himself so that he cannot devote his full time and energy to the testimony which is being presented? Why put a judge in a position of making a decision which is unpopular and not understood by the television viewers at the pos-

sible expense of injuring the rights of the litigants?"
Letter from Judge Henry S. Stevens, *Int. Rep.* p. 46.

It does not denigrate the judiciary to have judges required to stick to the aspects of the judicial administration of cases and their courtrooms for which they are trained and equipped.

C. The Right of Confrontation

The Sixth Amendment provides that the accused in a criminal trial shall have the right "to be confronted with the witnesses against him." This right of confrontation consists of the traditional right to cross-examine adverse witnesses. See 5 WIGMORE, *EVIDENCE* § 1397 (3d ed. 1940).

In *Willner v. Committee on Character and Fitness*, 373 U. S. 96 (1963), the Court held that a State bar applicant was denied due process when he was not permitted to cross-examine adverse witnesses regarding his fitness for admission to the bar. A fortiori, the right of cross-examination applies in State criminal proceedings. *E.g.*, *Grey v. Wilson*, 230 F. Supp. 860 (N. D. Cal. 1964). What has been called the Anglo-American legal system's greatest contribution to justice, 5 WIGMORE, *op. cit. supra*, § 1367, at 29, has been embraced within the Fourteenth Amendment. As stated in *Ex re Murchison, supra* at 134:

"due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his own behalf, and be represented by counsel."

This right to confront and cross-examine, as well as to introduce rebuttal testimony, is stripped of all meaning when a trial is televised.

The practicing lawyer knows the difficulty of arranging the attendance of witnesses under present conditions. They are often afraid; unaccustomed to appearing or speaking in public; and plagued by the gnawing doubt that they will be unable "to do justice to the facts and to themselves."

Cantrall, *supra* at 761. Already reluctant, the potential witness facing the possibility of being televised "for the world to see his struggle to express himself and to outwit the cross-examiner" will be that much more unavailable. *Ibid.* The timid will inevitably shrink from attendance, while the outgoing will fear that momentary lapse or gesture—amusing or ridiculous for all to see—caught and fastened by the camera, for the possible entertainment of millions. See Letter from Russell J. O'Malley, *Int. Rep.* pp. 66-67. See also Letter from Robert P. Hobson, *Int. Rep.* pp. 29-30; Letter from Willard L. Phillips, *Int. Rep.* pp. 54-55. And to have to subpoena the reluctant witness to compel him to undergo the publicity he dreads will only heighten the already distracting presence of the television lens. See Cantrall, *supra* at 761.

Once he begins to testify, the witness who does appear will be ever conscious of being televised not only on direct examination, but significantly on cross-examination where he will be embarrassingly forced to retrace his steps and less likely to recant under the gaze of such a vast audience. The operation of this adversary prodding, designed as it is for getting that much closer to the truth, is difficult enough under normal courtroom circumstances but is completely thwarted by the camera's mystic beam.

The televised witness will be even more prone to edit, tinge, or alter his words. See Letter from Thomas K. Younge, *Int. Rep.* pp. 47-48. Not only in words but in actions, reactions, and facial expressions will the witness respond differently by being electronically on view—and this may vitally influence the jury. See Letter from Hon. Arthur J. Murphy, *Int. Rep.* p. 54.

"Most witnesses when testifying are tense, some are outright nervous. Anything which intensifies that condition affects the witness, his testimony and the outcome of the trial." Letter from J. A. Rinehart, *Int. Rep.* p. 65.

Tensions are bound to increase when a witness feels the omnipresent audience watching every expression, following

each word. Douglas, *supra* at 842; see 83 A. B. A. REP. 655 (1958). The witness' preoccupation with personal appearance and dress are bound to be magnified, causing a more self-conscious and less direct presentation. See 62 A. B. A. REP. 863 (1937).

Thus, television will have a "disastrous effect upon the natural and straightforward character" of a witness' testimony. Consciously or unconsciously, he will "attitudinize", thereby diverting the traditionally regulated form of testimony and cross-examination. Allen, *Fair Trial and Free Press*, 19 F. R. D. 36, 42 (1955).

It should be added that the defendant himself, like the witness, will presumably be that much more reluctant to testify on his own behalf, will be that much more strained when testifying, and will be nervously and consciously on view to the television audience throughout the trial, all to his own prejudice.

D. The Right to Counsel

The right of a criminal defendant to have the assistance of counsel is, of course, a fundamental element of fair trial which applies to the States, as this Court recognized in *Gideon v. Wainwright*, *supra*. Cf. *Powell v. Alabama*, *supra*. This is no naked right, for defendant is entitled not only to have counsel but to have the adequate and effective assistance of counsel. *E. g.*, *Jones v. Cunningham*, 313 F. 2d 347 (4th Cir.), *cert. denied*, 375 U. S. 832 (1963) (failure to appoint counsel for an indigent defendant early enough to permit adequate preparation held to constitute a denial of the right to effective assistance).

Counsel cannot represent conflicting interests or owe loyalty elsewhere without violating a defendant's Sixth Amendment guarantee of "assistance" and, therefore, his Fourteenth Amendment due process protection. See *Glasser v. United States*, *supra* at 70; cf. *Von Moltke v. Gillies*, 332 U. S. 708, 725-26 (1948). Nor is a defendant adequately represented if counsel is so impeded by his estimation of the facts that his conscience prevents him from arguing

before the jury on behalf of his client. See *Johns v. Smyth*, 176 F. Supp. 949 (E. D. Va. 1959).

The transformation of the courtroom into a "moving picture theater" is a distraction which cannot help but unconstitutionally impair the undivided effectiveness of counsel (R. 65). As stated by petitioner's counsel at trial:

"the presence of all of the equipment that is here deprives the Defendant of due process in this trial in that it deprives . . . him of an opportunity to consult with his attorneys at the counsel table accurately; it deprives his attorneys of an opportunity to properly represent him in that it interferes with their handling of the case; it interferes with their conferences between each other; it interferes with their thought processes; it interferes with their interrogation of the witnesses and their comments to the Court and to the jury, because it is distracting and because it invades the privacy of the counsel table. . . ." (R. 53).

There is also a unique element of adequate representation here: to the extent that the great majority of lawyers in this country wholeheartedly subscribe to the principles of Judicial Canon 35, a serious conflict may arise when one of these lawyers is required to participate in a televised trial. Personal "outrage" may so color his feelings as to interfere with the rendering of his best services to his client (R. 23).

More broadly, lawyers, like others, may be affected by the presence of television cameras and become concerned, if only subconsciously, with their appearance to the world rather than thinking only of doing whatever is necessary, however unpopular that may be, to protect the rights of their client on trial. See Douglas, *supra*, at 842. What might normally be courtroom drama can easily turn into a prejudicial spectacle at the camera's prompting. See Tinkham, *Should Canon 35 Be Amended?*, 42 A. B. A. J. 843, 845 (1956). The already sensational atmosphere generated by the fact that a particular case was television-worthy might sometimes encourage an elected prosecutor

or a defense counsel to concentrate on the larger stage rather than devote every ounce of energy and thought to the cause on trial and the interests he represents there.

II

Petitioner has been deprived of the equal protection of the laws by having his trial selected for television.

Since the presence of television in the courtroom has the inevitable effect of invading petitioner's basic trial rights,* see Point I, *supra*, any rule or practice which gives the trial judge discretion to permit the televising of judicial proceedings will automatically deny the petitioner the "equal protection of the laws".

"Equal protection of the laws" . . . includes the right to be tried and punished in the same manner as others, accused of crime are tried and punished. . . ." *Lynch v. United States*, 189 F. 2d 476, 479 (5th Cir. 1951).

The practical effect of such discretion is that the judge will be confronted with media requests only in those cases involving the famous or the infamous; the deleterious effects of television will be visited on them alone.

* It should be noted that petitioner is entitled to a new trial without having to show specific prejudice. For example, denial of the right to counsel justifies a reversal and a new trial without any inquiry into whether the presence of counsel would have resulted in an acquittal. See *Gideon v. Wainwright*, *supra*; cf. *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) (assistance of counsel a jurisdictional prerequisite in federal court). Similarly with the right of confrontation, a defendant need not show that had he been allowed to cross-examine, the witness would have departed from his original testimony. See *Willner v. Committee on Character and Fitness*, *supra*. In the case of impartiality of judge or jury, the fact of bias need not be affirmatively established as long as there is a probability that it may exist. See *Rideau v. Louisiana*, *supra*; *Turney v. Ohio*, *supra*.

"It is only the sensational in trials for which there is a sufficient public demand to justify the expense that is involved; and no amount of euphemistic analogy between a courtroom trial, on the one hand, and 'delicate operations' or 'the inauguration of presidents and the coronation of kings, queens and popes,' on the other hand, will gloss over the crude fact that only where this kind of publicity may do the most harm will it be most used." Letter from Harold Horvitz, *Int. Rep.* p. 31.

Clearly, if the practical effect of a rule or statute is to deprive a person of equal protection, it is invalid despite the fact that the invalidity does not appear on its face. See *Yick Wo v. Hopkins*, 118 U. S. 356 (1886).

The type of trial a person receives should not depend on the incidental fact that he is famous or that the crime he is accused of inflames the community. Compare *Smith v. Bennett*, 365 U. S. 708 (1961); *Griffin v. Illinois*, 351 U. S. 12, 19 (1956).

Equal protection of the laws demands, therefore, that television be excluded from the courtroom in all cases.

"[W]hen exceptions are made and the trial opened up to broadcasting and television, the damage done may be too subtle to measure accurately.* . . . Since

* Defendant should not be put to the burden of proving in every instance what "no amount of research can ever adequately measure." Letter from Allen H. Gardner, *Int. Rep.* p. 49. Compare *Gideon v. Wainwright*, *supra*, with *Betts v. Brady*, 316 U.S. 455 (1942). In *Gideon*, the Court recognized that the right to counsel had become so fundamental that it should no longer be left to "special circumstances" in each case as required by *Betts*. The burden of showing the subtleties of adverse effects on judge, jurors, witnesses, lawyers and parties, many of whom would shy away from admitting any such effects, would ordinarily be greater than the burden of showing the adverse consequences of the absence of counsel. With respect to demonstrating positively the impact of television on a fair trial, the Special Committee on Proposed Revision of Judicial Canon 35 has indicated "that a sound conclusion on this issue will not be obtained from a survey by a professional fact-finding organization. . . . Mr. Elmo Roper entertained considerable doubt as to whether such a project would produce truly reliable conclusions. . . ." *Int. Rep.* p. 9.

defendants' rights are the interests protected by the public trial the end is best served by banning all photography, broadcasting, and televising. The camel should be kept out of the tent, lest he take it over completely." Douglas, *supra* at 844.

III

The rule contained in Judicial Canon 35 reflects the fundamental Constitutional principles of fair trial and equal protection here involved.

It is the Association's position that the absolute ban on telecasting recommended in Judicial Canon 35 does not simply reflect an optional rule of orderly judicial administration but rather a Constitutional requirement stemming from the fair trial, equal protection guarantees of the Fourteenth Amendment.

Canon 35 recognizes that telecasting "detract[s] from the essential dignity of the proceedings". This is not simply devotion to the pomp and grace of a bygone era, but an acknowledgment that decorum is essential to the reasoned search for truth. The atmosphere generated by dignified and orderly proceedings provides the necessary "laboratory" environment for dispassionate adjudication of human rights. See Wilkin, *Judicial Canon 35 Should Not Be Changed*, 48 A.B.A.J. 540 (1962).

Television destroys this essential environment of "fitting dignity and decorum" not because cameras and lights, microphones and wires, physically obtrude, but because of the very fact of its presence. It is not the noise and disturbance which is at issue, for technology can remove the tangible effects; rather, it is the inevitable psychological impact of the television lens. Griswold, *supra* at 617. Damage results not because the equipment is in plain view, but because, even if it cannot be seen, the subject knows he is or is apt to be televised. Tinkham, *Should Canon 35 Be Amended?*, 42 A.B.A.J. 843, 845 (1956).

"[H]owever unobtrusively . . . television cameras might be used, the very knowledge that the court-

room has become a 'live' theatre — and the judges, lawyers, jurors, defendants, and witnesses have become performers — would tend to distract from the true and only purpose of the trial. . . . None of this would help to maintain the sober atmosphere essential in preserving the most fundamental freedom of all — the right to get a fair trial." Editorial, *Toledo Blade*, Feb. 25, 1962, quoted in Griswold, *supra* at 618.*

Canon 35 further acknowledges that television "distract[s] participants and witnesses in giving testimony". This is a recognition of the subtle but potent effect of television upon our most revered fair trial traditions. The orderly interaction of each of the trial participants and the regulated presentation of evidence are precluded. Actors on camera can never be unself-conscious and effective trial participants. See WILLIAMS, *ONE MAN'S FREEDOM* 228 (1962), quoted at p. 89 of *Int. Rep.*

Finally, the Canon reflects the fact that television will "create misconceptions with respect [to court proceedings] . . . in the mind of the public". The addition of television can only serve to heighten the prejudicial public clamor which already surrounds the notorious trial, the trial most likely to be televised.** In fact, time limitations and public

* Obviously, the sober atmosphere is particularly vulgarized by commercial sponsorship of such telecasts. Douglas, *supra* at 843.

** The overriding issue involved here was adverted to in the REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY (Washington, D. C. 1964):

"The courtroom, not the newspaper or television screen, is the appropriate forum in our system for the trial of a man accused of a crime." *Id.* at 240.

The matters which the Commission recommended for consideration by the media and the bar are under study by an Advisory Committee of the American Bar Association under the Chairmanship of Hon. Paul C. Reardon of Massachusetts and of a Special Committee of The Association of the Bar of the City of New York under the Chairmanship of Hon. Harold R. Medina, but the question of television in the courtroom was settled for the American Bar Association by the action of the House of Delegates in 1963 (*supra*, p. 7).

interest would limit the media to selected portions of the most sensational trials. See Letter from Herman S. Merrill, *Int. Rep.* p. 34. There would be no visual "record" of the trial, only edited episodes selected not for relevance and evidentiary value but for newsworthiness and to satisfy public curiosity. See Cantrall, *supra* at 762.

Canon 35 embodies not only due process considerations, but in its uniform prohibition against the televising of trials, expresses the concern of the legal profession for equal protection for all defendants.

"A courtroom is not a stage; and witnesses and lawyers, and judges and juries and parties, are not players." A trial is not a drama, and it is not held for public delectation, or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth; and very careful safeguards have been devised out of the experience of many years to facilitate that process. It can hardly be denied that if this process is broadcast or televised, it will be distorted. Some witnesses will be frightened; some will want to show off, or will show off, despite themselves. Some lawyers will 'ham it up'. Some judges will be unable to forget that a million eyes are upon them. *How can we say that our primary concern is the equal administration of justice if we allow this to be done?*" Griswold, *supra* at 616 (emphasis added).

Those who favor cameras and broadcasting equipment in courtrooms sometimes assert that Canon 35 discriminates against radio and television in favor of the press. There is no such discrimination. The press is also subject to photography restrictions. Moreover, the press is not permitted to report directly from the courtroom — its printing presses are far removed. Similarly, radio and television reporters are equally free to take notes and send them outside the courtroom over their own broadcast "presses". See Griswold, *supra* at 616.

IV

Neither the right to a public trial nor freedom of the press requires that television be accorded access to the courtroom.

Those who favor television cameras in courtrooms sometimes also claim that this is necessary to insure a public trial and is a part of freedom of the press. But such arguments are plainly mistaken.

The right to a public trial, which is specifically granted in the Sixth Amendment, has been held to be of such fundamental importance as to be incorporated into the Fourteenth Amendment. This Court has said that:

"In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus [secretly] sentenced to prison." *In re Oliver*, 333 U. S. 257, 273 (1948).

Although the salutary effect of public exposure has been explained on several grounds, see ¹ BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 522-37 (1827), it has come to be regarded as a right which is designed for the protection of the accused. Radin, *Right to a Public Trial*, 6 *TEMPLE L. Q.* 381, 389 (1932).

"The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the require-

ment is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." 1 COOLEY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927).

Despite the necessary role which the public plays in securing this right, it is primarily the right of the individual defendant. The public interest in any particular trial can rise no higher than the standards of fair trial will permit. In *Tribune Review Publishing Co. v. Thomas*, 153 F. Supp. 486 (W. D. Pa. 1957), *aff'd*, 254 F. 2d 883 (3d Cir. 1958), the district court, in denying an application to enjoin enforcement of a State court rule against taking photographs in the courtroom, cautioned that while recognizing the public interest it

"must take cognizance of the fact that the constitutional right of the accused to a public trial is a privilege intended for his benefit. It does not entitle the press or the public to take advantage of his involuntary exposure at the bar of justice to employ photographic means to picture his plight in the toils of the law either while in jail, going or coming from court, or while actually in the court room." 153 F. Supp. at 495.

See also *In re Mack*, 386 Pa. 251, 126 A. 2d 679 (1956), *cert. denied*, 352 U. S. 1002 (1957); *State v. Clifford*, 162 Ohio St. 370, 123 N. E. 2d 8 (1954), *cert. denied*, 349 U. S. 929 (1955).

Similarly, in *United Press Ass'n v. Valente*, 308 N. Y. 71, 123 N. E. 2d 777 (1954), the court denied an application made by the press to restrain the trial court from excluding the public and the press. The court held that the press as

representative of the public had no legally enforceable right to be present at the trial.* In emphasizing that the right to a public trial is a defendant's right, the court noted:

"Actually, petitioners [the press] are seeking to convert what is essentially the right of the particular accused into a privilege for every citizen, a privilege which the latter may invoke independently of, and even in hostility to, the rights of the accused. A moment's reflection is enough, we suggest, to demonstrate that that cannot be, for it would deprive an accused of all power to waive *his* right to a public trial and thereby prevent him from taking a course which he may believe best for his own interests." 308 N. Y. at 81, 123 N. E. 2d at 781 (emphasis in original).

Nor does the guarantee of freedom of the press secure to the public the right to attend trials. Freedom of the press protects the right to disseminate ideas and, in some cases, the right to be harshly critical of a particular court's approach to legal problems and their resolution. See, e.g., *Craig v. Harney*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Bridges v. California*, 314 U. S. 252 (1941). When the issue is the scope of fair comment permitted to an observer at a public trial, freedom of press and speech is involved and the doctrine of clear and present danger applies. *Craig v. Harney*, *supra*; *Pennekamp v. Florida*, *supra*.

But no matter how jealously guarded the right of freedom of press and speech may be, it does not and has never

* The danger of elevating public trial into an overriding principle is clear:

"Public trial is now a mockery in many world capitals—Moscow, Havana, and Peiping, for example, where the courtroom has been taken outdoors by the government itself to better accommodate and amuse the public; a tragic swing of the pendulum which we know the news media of this country would strongly oppose." Letter from Russell J. O'Malley, *Int. Rep.* p. 67.

been held to guarantee access to newsworthy material.* The Court of Appeals for the Third Circuit put the issue in its proper perspective when it said:

"Realizing that we are not dealing with freedom of expression at all but with rules having to do with gaining access to information on matters of public interest, can it be argued that here there is some constitutional right for everybody not to be interfered with in finding out things about everybody else? We suppose it would not be contended that a newspaper reporter or any other citizen could insist upon entering another's land without permission to find out something he wanted to know. In the same way merely because someone's private letters might be interesting as gossip or as models of English composition it would hardly be argued that one could open another's desk and read through what he finds there. Could an interested observer insist on the constitutional right to take motion pictures of a private family in and about its household contrary to that family's wishes? We think that this question of getting at what one wants to know, either to inform the public or to satisfy one's individual curiosity is a far cry from the type of freedom of expression, comment, criticism so fully protected by the first and

* Even those few cases which recognize that the public may have some enforceable right to attend trials despite the defendant's waiver of his right to public trial do not base their conclusions on the Constitutional right of free speech. See *E. W. Scripps Co. v. Fulton*, 125 N. E. 2d 896 (Ct. App. Ohio), appeal dismissed as moot, 164 Ohio St. 261, 130 N. E. 2d 701 (1953); cf. *Kirstowski v. Superior Court*, 300 P. 2d 163 (Cal. Dist. Ct. App. 1956).

It may be that the public has some right to see that an accused gets a public and fair trial. See *Levine v. United States*, 362 U.S. 610, 625 (1960) (Black, J., dissenting). But if such a right does exist it is not by virtue of the free speech guarantee, nor does it permit the public to demand to examine the evidence and testimony in any way it pleases. Cf. *D'Acquino v. United States*, 192 F. 2d 338, 365 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952); *Gillars v. United States*, 182 F. 2d 962, 977 (D. C. Cir. 1950).

fourteenth amendments of the Constitution." *Tribune Review Publishing Co. v. Thomas*, *supra* at 885.

The inconsistent application of free press and speech to the question of granting permission to televise court proceedings is illustrated in the approach of the Oklahoma courts. In *Lyles v. State*, 330 P. 2d 734 (Okla. Crim. App. 1958), the court relied on the guarantee of freedom of speech and press to uphold the televising of a criminal trial. Subsequently, the same court held that the question of televising proceedings is within the discretion of the trial judge. *Cody v. State*, 361 P. 2d 307, 317 (Okla. Crim. App. 1961). But if the right to televise is based on free speech and press, it can only be curtailed by a showing of clear and present danger, *Craig v. Harney*, *supra*; *Bridges v. California*, *supra*; if the exercise of the right does rest in the discretion of the trial court, it bears no relation to these fundamental freedoms.

There can be no media complaint that radio and television reporters are treated less favorably than press reporters for they, too, are permitted access to the courtroom to prepare, with pencil and pad, for a subsequent newscast. The real complaint is

"that they can't gather the news in the ways they prefer— with cameras and microphones. The media do not seek access to information. They have that. They want something more. It might be called 'freedom of the lens and microphone.'" Tinkham, *Should Canon 35 Be Amended?*, 42 A. B. A. J. 843, 844 (1956).

But it is clear that:

"No valid argument can be made along this line. A guaranty of the right to say or print what you want, subject to abuse of the privilege, does not even imply a companion right to propagate what you say or write by any means that you choose. Certainly the right to publish the testimony of a witness grants no

right to stand beside him in the courtroom and repeat his testimony through a megaphone." Lyman, *Courts, Communications and Canon* 35, 46 A. B. A. J. 1295, 1297 (1960).

Conclusion

For the reasons stated it is respectfully submitted that the judgment should be reversed and the case remanded for a new trial.

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February 19, 1965.

APPENDIX

REPORT OF THE SPECIAL COMMITTEE ON PROPOSED REVISION OF JUDICIAL CANON 35 RECOMMENDATIONS*

I. The Special Committee on Proposed Revision of Judicial Canon 35, after investigation and study, concluded that the substantive provisions of Judicial Canon 35 remain valid and with minor deletions should be retained as essential safeguards of the individual's inviolate and personal right of fair trial. We therefore recommend the adoption of an amendment to Judicial Canon 35 by which the words bracketed will be deleted, and the words italicized are added, as follows:

Judicial Canon 35, Improper Publicizing of Court Proceedings

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] *participants and* witnesses in giving [his] testimony, [degrade the court] and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

* The recommendations were adopted by the House of Delegates February 5, 1963.

II. The Canons of Professional Ethics and the Canons of Judicial Ethics; as adopted by the American Bar Association, constitute the standards of policy recommended by the American Bar Association for the consideration and voluntary guidance of the rulemaking authorities of the states of the United States, and have the force of law only where voluntarily adopted and incorporated in state laws or as a rule of court. We recommend that the rulemaking authority of each state exercise the exclusive responsibility of adopting Canons of Ethics in the interest of state-wide uniformity, and avoidance of confusion and pressures that have resulted in some jurisdictions where magistrates or judges have individually adopted rules concerning the conduct of their courts.

REPORT

The Special Committee on Proposed Revision of Judicial Canon 35 submits the following report on its activities since the 1962 (San Francisco) annual meeting of the American Bar Association.

Some news media representatives have, since 1937, sponsored the proposal that present Judicial Canon 35 should, insofar as it recommends against photographing or broadcasting of court proceedings, be abolished, or that the judge of each court have discretion as to whether photography and broadcasting should be permitted. As a result of media contentions, the American Bar Association House of Delegates in 1958 adopted a resolution¹ to carry out recommendations of the Board of Governors of A.B.A. that there be created a special committee, composed of nine members of the Association designated by the President, to:

... conduct studies of the problem ... obtaining
... body of ... data ... of experiences of judges
and lawyers in ... courts ... where either photog-
raphy, televising ... are permitted ... confer with
representatives of ... interested media ... to report

¹ Interim Report and Recommendations, p. 2.

to the House of Delegates, the result of its studies and surveys. The fundamental objective . . . must be to consider . . . recommendations which will preserve the right of fair trial. . . .

Our committee has sought earnestly to be objective in its study of the various contentions of the media with respect to Judicial Canon 35. Our "Interim Report and Recommendations" filed with the House of Delegates in August, 1962, set forth the area and perspective of our survey and study, including an all day hearing in Chicago (February, 1962) during which prominent media representatives² expressed their views on the subject.

We are conscious of the importance of maintaining a normal and mutually respectful relationship between those charged with the administration of justice and those having responsibilities related to the dissemination of news. Public respect for, understanding of and confidence in the courts are greatly influenced by the manner in which the news media interpret and publicize the functions of the courts.

This concept was aptly stated by the Supreme Court of Florida,³ as follows:

There is little justification for a running fight between the courts and the press (and other media) on this question of fair trial and a free press. Both are sacred concepts in our system of government. Both are in one constitution and govern one nation of millions of individuals. All that is required to preserve both is for the press and the courts to place the emphasis on the Constitution instead of themselves.

Due to our realization of the vital importance of a genuine relationship between the legal profession and the gentlemen of the Fourth Estate, we have sought to explore all

² *Id.*, p. 6.

³ *Id.*, p. 9; *Brunfield v. Florida*, 108 S. E. 2d. 33.

facets of the problem. Thus, our Interim Report and Recommendations, under date of July 23, 1962, contained informative data and pro and con viewpoints on the Judicial Canon 35 issues:

The principal reasons advanced by media spokesmen for contending that Canon 35 either should be abolished or substantially changed, and our committee's conclusions with respect thereto, are set forth in summary form below:

I

Media Contention

Our constitutional rights are hardly being served if we are barred while other segments of the press remain. There aren't two sets of rights—one protecting the newspaper reporter and another the news broadcasters; we are protected by the same Freedom of the Press; what applies to one must apply to the other.

There are some who would permit us (T.V.) in the courtroom with a pencil and paper so long as we leave our tools—our cameras and microphones outside.

Committee Conclusion

Radio and television reporters have exactly the same rights as the newspaper writer. Just as the newspaper reporter may come to court, observe the proceedings and report his observations in the press, so too may the radio or television reporter come to court, observe the proceedings and report his observations over radio or television. The newspapers may not send their cameras into the courtroom or into most state courtrooms any more than the other media.

⁴Id., p. 84.

Media Contention

It is contended that Judicial Canon 35 is restrictive of the freedom of the press and the public's "right to know;" that "star chamber" proceedings and criminal trials *in camera* would be avoided; that prohibiting media apparatus in the courtroom restricts the constitutional right of a "public trial."

Committee Conclusion

We believe that such media contentions are misapplied when used to justify cameras and broadcasting in the courtroom. The right of free press and the guaranty of a fair trial are equally sacred constitutional privileges guaranteed in one Constitution. Differences exist on this phase of the subject because emphasis is placed on one constitutional right without sufficient recognition that each constitutional right cannot be isolated. We must consider our Constitution as one integrated charter of liberty.

...The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding. *Justice Louis D. Brandeis*

We have borrowed from Justice Brandeis' philosophy without intending to connote to the media any other meaning than that apparently they adopt an inapplicable premise. The underlying principles with respect to public trial and freedom of the press are, we believe, misapplied by the news media in order to justify T.V. and radio in the courtroom.

The reason for public trial is to protect the accused against the ancient abuses of "star chamber" proceedings, when defendants in criminal cases were tried secretly and when no one other than the prosecution knew of the nature of the charges. The right of public trial, however, is the right of the defendant — not the right or privilege of the press. It is a misconception of the media representatives that the right of public trial requires throwing open the courtroom as if the main purpose of the trial is to satisfy the curiosity of a vast unseen audience.

Thomas M. Cooley, former Justice of the Supreme Court of Michigan and Professor of Law at the University of Michigan in his authoritative treatise "Constitutional Limitations,"⁵ wrote:

The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would be drawn hither by a prurient curiosity, are excluded altogether.

III

Media Contention

The decision as to photographing and broadcasting of trials should rest entirely with individual judges.

Committee Conclusion

The right to a fair trial does not belong to the trial judge to dispense or curtail as he sees fit. Rather it is a sacred right of the accused. The Interim Report and Recommendations of this committee solicited the views⁶ on this subject of members of the bench and bar, and many have been forthcoming.

Our concept of "equal justice under law" is that it is best achieved by the guarantees of the "rule of law and not of men." Our committee has been constrained to make a special recommendation relating to this point, namely Recommendation II, wherein it is recommended that the rulemaking authority in each state exercise exclusive juris-

⁵ *Id.*, p. 86.

⁶ *Id.*, p. 78.

diction in establishing rules of court so that state-wide uniformity results.

This recommendation does not imply lack of confidence in the ability or integrity of members of the bench in the several states. Our recommendation is intended to protect individual judges from having to determine in each case whether broadcasting should or should not be permitted. Our survey makes clear that trial court judges particularly would welcome the establishment of a uniform policy on this subject. Rather than imposing such additional burden on an individual judge, we believe that the decision should be made by the legal profession acting through the rulemaking authorities. If no judge in any state can allow broadcasting or televising by decision of the rulemaking authority of that state, then no judge can be criticized by the press, radio or television for refusal to allow broadcasting from his court. If broadcasting is permitted by one or two judges, particularly in states where they are elected, then there is bound to result great pressures on the remaining judges. As was stated by Dean Griswold:⁷

It should be obvious that the way to protect the administration of justice against these pressures is to keep the door firmly closed.

... Insofar as a decision against broadcasting and televising is unpopular in certain quarters the brunt of the decision should be taken by the profession as a whole, and should not be shifted to individual judges.

IV

Media Contention

The electronic media and news photographers assert that trials can now be photographed and broadcast unobtrusively, which was not the case when the Canon was adopted.

⁷ A.B.A. Journal, July, 1962, Vol. 48, No. 7, p. 615.

Committee Conclusion

It is acknowledged that photography and broadcasting have made great advances in technology and techniques. Both play important roles in news reporting. Some forms of photographic and broadcasting equipment are less obtrusive than others. Yet the very presence in the courtroom of various photographic and sound devices, with operators working under the intensely competitive pressures of their craft, tends to cause distractions and are disruptive of the judicial atmosphere in which trials should be conducted.

We feel that despite the contentions of the media to the contrary a serious doubt exists that a fair trial can be guaranteed if Canon 35 is relaxed to the extent of permitting photography, radio or television coverage. We are confirmed in this belief by the experience in trials of cases, including results in those states where this form of coverage has been permitted, notably the Graham trial in Colorado and the Estes trial in Texas.

We feel that as long as a doubt exists that an orderly trial is possible, if the media are permitted to photograph and broadcast trials in the manner they request, the provisions of the Canon 35 should not be relaxed. The substantial advances during the past few years, in partially eliminating the physical distractions that existed in the earlier days of photography and broadcasting, do not constitute sufficient reason for allowing court access to such equipment.

Some media representatives assert that the policy embraced in Canon 35 is founded in discrimination against electronic reporting. Reference is made to the fact that church services frequently are televised. Thus, the conclusion is drawn: *If television is a proper instrument in the house of the Lord, it is not out of place in court.*

The faulty logic of this comparison is made clear in the editorial of the *Saturday Evening Post*, October 20, 1962, entitled, "No Place for Television," in which it was stated:

The televising of church services is a far different thing from the prejudicing of a defendant's rights—even if the defendant is Billie Sol. Under law the

objective of any trial is justice, not publicity. Every effort should be made to maintain a calm, judicious atmosphere in the courtroom. Photographic coverage intrudes upon and disrupts this atmosphere.

V

Media Contention

It has been represented that "competitive pressures" would be eliminated because newspaper and broadcasting industries have offered voluntary pool arrangements which would limit the number of photographers admitted to the courtroom, and also, by the adoption of a voluntary code of conduct.

Committee Conclusion

The most recent example of the failure of any such voluntary system was clearly exhibited at the outset of the Billie Sol Estes trial. The following is *The New York Times* account of what happened:

A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates.

A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. Cables and wires snaked over the floor.

This apparently unconscionable situation eventually was somewhat corrected by the trial judge requiring construction of a special screen to conceal the bulky equipment with lenses protruding. It can be contended that television and radio in general should not be judged by that example, and that we should respect the efforts of conscientious media representatives to establish uniformly high stand-

ards of news coverage. However, similar instances have come to our attention when the case was deemed sufficiently "newsworthy" and the competition was keen for electronic reporting advantages.

VI

Media Contention

It is contended by some media representatives that Canon 35 is "legislation beyond the authority of any professional association."

Committee Conclusion

The Canons of Professional Ethics which apply to lawyers, and the Canons of Judicial Ethics which are applicable to judges, are not legislative edicts. They are recommended standards of professional and judicial conduct. The original Canons of Ethics were promulgated in 1908 by the legal profession acting through its national association, the American Bar Association. They have been implemented through voluntary action of the courts and of state and local bar associations in adopting them in their exact or similar form.

Thus for more than a half century the Canons of Ethics of the American Bar Association have come to be generally recognized as the accepted standards of professional conduct nationally.

In the case of Judicial Canon 35, its adoption in 1937 came about through action of the House of Delegates, a deliberative body broadly representative of the profession as a whole. The House of Delegates includes representatives of all of the autonomous state bar associations, as well as delegates chosen by major local bar associations and various national legal organizations. It is the recognized policy forum of the profession.

There has been an unfortunate misconception among some media representatives as to the role of the American Bar Association with regard to the Canons of Ethics. It has been implied that the ABA has arrogated unto itself the

authority to dictate to judges and lawyers. This is not the case, since the Canons themselves have no statutory force. Their acceptance by lawyers and judges is a matter of voluntary choice; not compulsion. Nationwide adoption of the Canons with occasional exceptions or variations, has been a matter of state by state determination.

We trust that with this explanation it will be made clear that the policy as to broadcasting or photographing of court proceedings rests upon the ultimate determination of the legislative or judicial authority of each state.

This fact, when considered with the record that nearly all of the states have *voluntarily* adopted Judicial Canon 35, in one form or another, is, we submit, persuasive of the conclusion that the great majority of those charged with the responsibility of the administration of justice have concluded that the right of fair trial is best maintained and preserved by continuing in effect Judicial Canon 35.

*Judicial Experiences**

A. United States Chief Justice Earl Warren, in his capacity as Chairman of the Judicial Conference of the United States, stated in a letter to the Chairman of the Special Committee:

While it is not our practice to make public the work reports of the Conference Committees, I can say to you that the members of the Conference were unanimous in their belief that subjecting the courts to such practices (the taking of pictures during judicial proceedings) is inimical to the administration of justice. It was not a matter of first impression either with the Committee or the Judicial Conference because we have long had Rule 53 of the Federal Rules of Criminal Procedure, the wisdom of which the Conference has never doubted, and the Resolution of the Conference is but further implementation of it. I believe you may assume that it is the constant pres-

* Some names are withheld, but are available in Committee files.

sure which has been applied to negate the Rule that prompted the re-affirmation and extension of it by the Conference.

B. A trial court judge in a western state, upon being informed that news photographers were preparing to take photographs in his courtroom, invited them into chambers and informed them that such photography would be in violation of judicial ethics and would not be permitted. The judge sought the unanimous agreement of the remaining judges of like jurisdiction to adopt a written rule against photography, but did not succeed because some of the judges were in the midst of campaigns for re-election. The judge thereupon adopted and posted the rule prohibiting photography in his court.

The next day the local newspaper published a front page story which featured the judge's action and his photograph. Later, when the judge appeared as the principal speaker at a civic club during the campaign with photographers and news reporters present, it was pointedly made clear that no pictures of the judge would be taken. No picture of the judge or news stories appeared during the remainder of the campaign, although special coverage was given his opponent. The night before the election the local newspaper published an item which contained statistics concerning the appellate record of the judge. He alleged these to be false.

C. Superior Court Judge Henry S. Stevens⁹ of Phoenix, Arizona, stated in a letter to the committee:

This being an election year and I again being a candidate for re-election, it might be unwise for me to write this letter. However, I feel that these views must be expressed.

... Woe be unto that judge who has sufficient courage to exclude photography in a celebrated case. I ven-

⁹ Interim Report and Recommendations, p. 38.

ture to say he will not be dealt with in a kindly manner by the press. I know from bitter experience that disfavor with the press can be a pretty rough ordeal.

D. Thomas K. Younge,¹⁰ Grand Junction, a former president of the Colorado State Bar Association, stated:

At that time (1956) there was considerable pressure put upon Colorado Judges (all of whom were then and are now elective) by newspapers in editors columns and feature stories for the repeal of the Canon. There is no question in my mind that the individual judges of the Supreme Court were each aware that they must sooner or later stand for reelection and would need the support of the newspapers in their campaigns. I believe that they were thereby influenced in their decision, which as you know was to abolish Canon 35 and permit the taking of pictures and the broadcasting of proceedings at trials.

E. An Appellate Court Judge of Illinois,¹¹ formerly a trial court judge stated:

It is a rare person who is able to subject himself to a photograph in a tense moment, without some distraction which reacts either in what is said or a facial expression. The administration of justice is too tenuous to ever permit this to occur in any case.

F. A Michigan Circuit Judge¹² stated:

... I agree ... that judges should not be placed in the difficult position of meeting the pressures which would be brought to bear upon them by the news

¹⁰ *Id.*, p. 47.

¹¹ *Id.*, p. 54.

¹² *Id.*, p. 57.

media. . . . I rely upon Canon 35. If the Canon is relaxed . . . the heat will be on.

G. The Committee on Judicial Ethics of the State Bar of Michigan in an opinion published in April 1960¹³ took serious note of the powerful political incentives and effects (of the practice of permitting televised broadcasting) and the competitive political rivalries between members of the judiciary which would be compelled by permitting such broadcasts.

H. Oneida County (New York) Judge J. Walsh¹⁴ commented:

The constant pressuring by individuals for permission to take photographs often gives the improper impression that the court is attempting to conceal something, or to prevent complete publication on court matters.

. . . .

If Canon 35 is to be unchanged, then a definite and forthright statement to that effect should be issued.

I. Recently John B. Burke, Esq., of St. Paul, Minnesota, voluntarily wrote to judges of various branches of the judiciary in his state and inquired as to their opinion with respect to Canon 35. Answering letters:

Judge Underhill (Duluth): "... the rule is a very real protection for the trial judge."

U. S. District Court Judge Devitt (Minneapolis): "It shocks me to see television and photographic coverage of the Billy Sol Estes trials in Texas."

Superior Court Chief Justice Knutson (St. Paul): "Anyone who has had experience in a courtroom knows that many witnesses will be greatly influenced by the knowledge that they are being photographed or that they are appearing

¹³ *Michigan State Bar Journal*, May 1.

¹⁴ *Interim Report and Recommendations*, p. 60.

on a television program. While the dissemination of news is important, I think in this area it is even more important that trials can be conducted as they should, unfettered by any influence such as this."

District Court Judge Mason, Fifth District (Mancato): "It is true that improved methods of photography for still, moving and television pictures, eliminate much of the former objection to pictures; in fact, many of the people in the courtroom would not know that a camera was being used. It is also perhaps true that photographers have as much right in a courtroom as reporters, and are considered as such. But I think the end result, Colorado and Texas notwithstanding, would be to unduly dramatize and magnify situations and parts of a trial out of proportion. Witnesses, by far the greater number of them, are in court for the first time, and to know that they might be the object of picture-taking or broadcasting would be bound to detract from the business at hand — the truth.

"The matter of determining whether broadcasting or pictures should be permitted in the courtroom, should not be left to the individual judge. The application of the canon should be uniform. I favor retention of Judicial Canon 35 in its present form."

William Merlin, President of Municipal Judges Association (Minneapolis) reported that the members of the Executive Committee of the Association agreed that:

... Canon 35 is one of the bulwarks protecting the rights of parties and that no change should be made.

There was one other point that I wish particularly to make. Judges and other court personnel are under sufficient pressure as is from the news media. It would be more difficult for the judge and court personnel to maintain objectivity and proper judicial presence if such activities were going on.

District Court, Second District, Judge Leonard J. Keyes (St. Paul): "A suggested alternative which would permit

each judge to make his own determination relative to the presence or absence of certain communications media in the courtroom would be chaotic and even worse than an abolition or modification of the present canon."

Those who differ with the recommendations of our committee will no doubt state that we have only referred to incidents that apparently constitute a sound basis for our conclusion. In our Interim Report and Recommendations we set forth all of the views, both pro and con. As we view it our conclusions are warranted if abuses occur only in a small minority of cases. Under our system of justice it is not our object merely to seek justice for the majority. We seek it for all. In striving for the ideal, we may approach a greater capacity of man to do justice.

Proposed T.V. Test Experiment

A proposal was made at our public hearings for news media representatives on February 18, 1962, in Chicago by Richard E. Cheverton, President of the Radio-Television News Directors Association, that a series of experimental broadcasts of trials be undertaken at agreed locations. It was proposed that these tests be conducted by television stations under bar and court supervision as a means of demonstrating the efficacy of broadcast coverage of trials.

The proposal has received the careful consideration of members of this committee. As we stated in our Interim Report and Recommendations to the House of Delegates, in August, 1962, we considered the proposal by the electronic media to have been made in complete good faith and to be significant "evidence of their willingness to objectively consider the issues involved."¹⁵ Our evaluation of the proposal has included not only the mechanics of the test plan, but its relevancy to the many facets of the total problem.

While the experiments might tend to throw light on the technical and perhaps some of the procedural problems of courtroom broadcasting, we concluded they could not be

¹⁵ *Id.*, p. 16.

fruitful in resolving the fundamental and complex issues bearing upon fair trial, and that therefore no positive purpose could be served by carrying the experiments forward at this time.

The experiments could not recreate conditions that would prevail in trials of transcendent national interest, such as the Dr. Sheppard trial in Cleveland, a Finch-Treggoff trial in Los Angeles, the Accardo trial in Chicago, or the Estes case in Tyler, Texas, to cite only a few recent examples. In all such instances the presence in the courtroom (or partially behind a partition) of T.V. cameras, microphones, sound equipment and technicians, in addition to the already exceptionally large conventional news corps, would present problems that would not exist under controlled test conditions. The very trials which would pose the greatest problems in this regard would, because of their "news value," be those which the media would be most anxious to broadcast.

We favor continued cooperation with media representatives because the administration of justice in a democracy cannot function properly without the enlightened and conscientious understanding of the media and press, as stated in our Interim Report. Traditionally, there has been a close affinity between the press and the bar. We respect the views expressed by Mr. John H. Colburn, who attended our committee meeting in Chicago as a representative of the American Society of Newspaper Editors as Chairman of its Freedom of Information Committee, and who is a past president of the Associated Press Managing Editors. Mr. Colburn, in his 1961-62 report to the American Society of Newspaper Editors annual convention at New Orleans, replying to the question "What can be done about it?" (Canon 35) wrote:

Editors must do a better job with their own photographic staffs who are daily operating in public view. Many of the impressions of lawyers and jurists are formed not from courtroom operations, but from the activities of photographers and broadcasters in their coverage of major public events.

where the decorum of the press is often anything but dignified.¹⁶

This Committee has drawn what it considers to be a valid distinction between actual trials and ceremonial events occurring in courtrooms. We therefore have recommended the retention of the latter part of Judicial Canon 35, which approves broadcasting or televising naturalization proceedings and other court ceremonies, such as inductions of judges or patriotic programs. We believe such events are clearly distinguishable from trials involving the life, liberty or property rights of the individual citizen.

Colorado and Texas Experiences

Since 1956, two states, Colorado and Texas, have, by court rule or practice, left to the discretion of individual state court judges the decision to allow or disallow photography and broadcasting of trials.

Colorado. In Colorado, the rule resulted from a report by Justice O. Otto Moore, as Referee. The substance of the Colorado Rule is as follows:

Proceedings in Court should be conducted with fitting dignity and decorum:

Until further order of this Court, if the trial judge in any court shall believe from particular circumstances of a given case, or any portion thereof, that the taking of photographs in court rooms, or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted; provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection; and pro-

¹⁶ *National Press Photographer*, May, 1962, p. 12.

vided, further, that under no circumstances shall any court proceeding be photographed or broadcast by any person without first having obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed by him.¹⁷

Apparently, the Colorado Rule delegates to each individual trial judge discretion as to whether to allow or disallow telecasting, etc., of court proceedings. Such individual judge's determination is subject only to the objection of a witness or juror under subpoena and is not subject to a defendant's objection.

Judge Joseph H. McDonald, who was the trial judge in the Graham murder trial in Colorado in 1958, in which the defendant was charged with placing a bomb on an airliner resulting in the loss of many lives, including the defendant's mother, interpreted the Colorado Rule as not affording the *defendant* the right to object to his trial being televised. Judge McDonald is quoted as saying:

I didn't grant that request because I felt that the defendant himself, as to the general over-all coverage of the trial, has no rights in the premises, that it was up to the court to determine whether or not his rights were being violated and of course, I felt they were not being violated by permitting this type of coverage at this trial.¹⁸

The basis of not providing in the Colorado rule that a *defendant* shall not be photographed, or have his testimony broadcast over his expressed objection, apparently is that "the defendant himself has no rights in the premises."¹⁹ Judge McDonald further stated: "... it was up to the court to determine whether or not his rights were being violated."

Such judicial judgment was made before the defendant's trial had commenced. Is indictment of itself a proper

¹⁷ Reported 296 P. 2d 465.

¹⁸ *Broadcasting Magazine*, May 13, 1957, p. 143.

¹⁹ Interim Report and Recommendations, p. 12.

basis, notwithstanding the presumption of innocence, for any judge to ignore or overrule a defendant's objection to having his trial televised?

The Colorado rule, while giving consideration to the objection of witnesses and jurors, does not by its provisions recognize the objection of a defendant whose liberty or property is involved and who is an unwilling participant in the proceedings, to an extent greater than a witness or a juror. It would appear that the exception in the case of a "witness or juror" is recognition of the personal right of "witnesses or jurors under subpoena or order of the court,"²⁰ regardless of the judge's views, to refuse to submit to being photographed or televised.

Apparently the inconsistency of not affording the same right to a defendant eventually was recognized informally by the Colorado court. That was made evident by an informal suggestion that resulted from a judicial conference of the Colorado Court, that T.V. etc., should not be allowed without the defendant's consent.²¹

It is by no means certain the obtaining of the consent of a defendant to the telecasting of his trial is a reliable practice to follow. On a number of occasions the courts have held that where a right is so fundamental as to be a vitally integrated component of the process of administering justice, such a right cannot be waived by the accused. The guarantee of a fair and impartial trial without interference or diversion could conceivably be such a right.

Texas. The controlling policy of the Texas courts is that "the control of trial coverage by various news media should be left in the trial courts." This resulted from a report of a Committee on Televising, Broadcasting and Photographing Court Proceedings dated October 25, 1957, to the President and Board of Directors of the State Bar of Texas,²² which committee was appointed to investigate

²⁰ *Id.*, p. 13.

²¹ *Id.*, pp. 19-20.

²² *Id.*, p. 74.

and make recommendations concerning the adoption by the State Bar of Texas of Canon 35. The chairman of the committee was Chief Justice Spurgeon E. Bell of the Court of Civil Appeals, First Supreme Judicial District. The committee reported:

After thorough discussion, your Committee has concluded there is no need nor demand for the adoption of Canon 35 by the bar generally, or the public, and we recommend against its adoption.

We feel the control of trial coverage by various news media should be left in the trial courts. They have inherent power to exclude or control coverage in the proper case in the interest of justice.

In connection with such control the committee declared that there should be no use of flash bulbs or other artificial lighting; no witness, over his expressed objection, should be photographed, his voice broadcast or televised; representatives of news media must obtain permission of the court to cover by photography, broadcasting or televising, and shall comply with the rules prescribed by the court.

Thus under the Texas system there is recognized only the right of a witness to object to being "photographed, his voice broadcast or be televised." Such right apparently is not afforded a defendant.

This judicial policy was enforced in the recent trial of Billie Sol Estes before District Judge Otis T. Dunagan, at Tyler, Texas, who ruled, over the objections of defendant's lawyer, that television and cameras would be permitted in the courtroom. The objection by counsel for the defendant was based on the contention that the presence of photographers and their cameras would prevent his client from having a fair trial. Photographs were made of the conditions within the courtroom and immediately adjacent to the court house, and prints of the photographs were made available to this committee. The court conditions as de-

icted by the photographs apparently are accurately described in the quote from *The New York Times*.²³

"Broadcasting," a magazine published weekly by Broadcasting Publications, Inc., editorialized in its issue of October 1, 1962:

The postponement of the trial to Oct. 22, for reasons having nothing to do with television, will give broadcasters a chance to tidy up their coverage plans of a trial that will attract national attention. If a remote van is to be used, let it be moved to a less obvious location. If live cameras are to be used, admit the absolute minimum and pool their coverage. If it is possible to erect some kind of screening to conceal both live and film cameras, by all means put up the screens under the direction of the best stage manager obtainable.

In this case television is on trial with Mr. Estes. If tv loses in this court it has dimmer prospects on appeal than Mr. Estes will have if he loses.

At the postponed session of the court the several T.V. cameras were removed from inside and outside the bar to a position behind a partition, with lenses of several T.V. cameras projecting through an opening.

Our attention has been called to an incident that occurred in the David Frank McKnight hammer-wielder murder case in 1958 which was pending in the District Court at Amarillo, Texas. The local T.V. station applied to the court for permission to telecast the proceedings and the court conditioned approval on the defendant's consent. It is related that the defendant's consent was obtained in consideration of the payment of \$1,000. No doubt this was an isolated instance, but it is indicative of the problems that may be added to the existing difficulties inherent in the administration of criminal trials.

Members of this committee have interviewed and corresponded with many judges, lawyers and officials within

²³ See page 6 of this report.

Texas and Colorado. While some divergence of opinion was disclosed, a majority of the lawyers and judges interviewed in those states have reacted unfavorably to photography and broadcasting of trials. Actually, trials have been broadcast in surprisingly few cases. Whether this is due to broadcasters having lost interest in televising routine cases, or the unwillingness of some judges to permit broadcasting, is unclear.

Among the opinions received was that of Alfred P. Murrah, Chief Judge of the United States Court of Appeals for the Tenth Circuit, which includes Colorado, who recently wrote in response to our inquiry, as follows:

I have given a lot of thought to revising Canon 35, and while the time may come when we must make some concessions, I am not ready to do it now. Certainly we cannot give ground without some safeguards, for if we leave it to the judges or to the media, we are lost—there is no half way ground.

As evidenced by the material contained in the Interim Report and Recommendations of our committee dated July 23, 1962, and information obtained thereafter from representative sources, our committee concluded that adequate and meaningful data on the experiences of judges and lawyers of Colorado and Texas with photographing, televising or broadcasting court trials had been obtained on which to base our recommendations on the fundamental objective of our assignment, namely, "recommendations which will preserve the right of fair trial."²⁴

We have noted that at the annual Judicial Conference of the Texas judiciary, there was on the agenda for October 6, 1962, the item "Judicial Ethics," which was to deal with whether the Canons of Judicial Ethics should be approved in principle, after considering the adoption of the remaining Judicial Canons as recommended by the American Bar Association. The subjects were on motion tabled. How-

²⁴ Interim Report and Recommendations, p. 2.

ever, a motion was carried to appoint another committee to consider the adoption of the Canons of Judicial Ethics.

Resolution of the Judicial Conference of the United States. The fact that the substantive provisions of Judicial Canon 35 recently have been reaffirmed by the further implementation of Federal Rule 53 of Criminal Procedure by unanimous Resolution²⁵ of the members of the Judicial Conference of the United States, presided over by Chief Justice Earl Warren, is further evidence that the judiciary and the bar of the courts of our several states and of the United States, with few exceptions, believe that the substantive provisions of Judicial Canon 35 represent sound policy in judicial administration. The Resolution of the Judicial Conference, while respected and persuasive, has not been deemed controlling by our committee. We therefore have made an independent survey and study on the basis of which our recommendations are made.

Concluding Consensus

No scientific means exist on which to assess the direct effects of photography and broadcasting upon trials, or their indirect effects in influencing public opinion for or against a defendant or litigant in ways which could affect the outcome of trials. Neither is there any evidence that would be the basis for concluding that fair trial would be better served by permitting photography, broadcasting or televising in our courts.

It may well be conceded that under ideal circumstances and with ideal equipment in the hands of competent and discreet technicians near noiseless photography and broadcasting are possible, but we do not believe that noise and confusion are the sole or perhaps even the principal objections. It does not follow that near-silent photography is nearly or entirely harmless. Trial participants are made actors, willingly or not. If they are unwilling actors, then

²⁵ *Id.*, p. 97. See also Chief Justice Warren's letter at p. 7 [A-11] of this report.

their dignity as human beings and perhaps their vital legal rights are violated. If willing actors, then they may be even more dangerous because their concern may well be their effectiveness as actors rather than compliance with their oaths.

Since most of our state judges still are elected in political campaigns, in which their success can be affected by the media of public communication, it is unfair to subject them to potentially powerful pressures for a favorable decision as to courtroom privileges, the denial of which may result in open and effective opposition of the disappointed media. We conclude that individual judges should not be empowered to abrogate Canon 35 and infringe the rights of the litigants thereby affected in any particular case. What the decision on Canon 35 should be, when all judges are appointed and enjoy security of tenure and freedom from pressures related to the partisan elective system, is not for this committee to suggest now. The achievement of the ideal of non-political judicial selection would, however, alter the posture of the problem.

The profession of law has the responsibility to maintain and improve the sound administration of justice. We are dedicated to this task. In stating this we do not mean to impugn the profession of journalism practiced through old or new mediums. What we do intend is to state without qualification "every man unto his own." The legal profession has this responsibility: namely, to take a position on this subject based on practical experience and its considered judgment as to the best interests of society.

With the difficulties inherent in a system where men are called upon to judge each other and thereby assume an infinite function, and if we may assume that the bench and bar are dedicated to maintain and improve the administration of justice, we feel justified in suggesting to our friends of the media that perhaps the legal profession is best qualified to determine factors that add or detract from the administration of justice.

Our committee concludes that the safeguards embodied in Judicial Canon 35 are in the best interests of the orderly administration of justice and that the substantive provisions thereof remain valid and should be retained.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 256

BILLIE SOL ESTES,

Petitioner

v.

THE STATE OF TEXAS.

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 256

BILLIE SOL ESTES,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS

BRIEF FOR THE PETITIONER

SUMMARY STATEMENT OF THE CASE

Petitioner, Billie Sol Estes, was charged with a felony below upon an indictment for swindling under Texas Penal Code, (1925) Article 1545 (R. 1-8: Petition for Certiorari, Appendix C, pp. 53a-60a). The defendant was convicted, and sentenced to serve eight (8) years in the penitentiary (Petition for Certiorari, Appendix A, p. 1a). The statutory penalty provided is the same as the penalty for felony theft. See: Tex. P.C. (1925), Articles 1421 and 1550 (Appendix, this Brief, 46-47).

Prior to the beginning of the trial, Counsel received notice through the press that the Court intended to permit live television and radio coverage of the trial (R. 8).

Thereupon, prior to the calling of the case, defendant through his Counsel notified the Court that Counsel desired to take up with the Court certain matters before the defendant made his appearance in person. When the Court convened, certain proceedings occurred with reference to the live television and broadcast of the trial (R. 9).

The proceedings are found in the printed record (R. 30-60). Numerous photographs, which are not reproduced, are part of the record; and these illustrate the conditions in the courtroom. Defendant's objections to live television were overruled (R. 9).

The Court passed the case until October 22, 1962, because of absence of witnesses (R. 9 and 19).

On October 1, 1962, the Court without consulting defendant or his counsel issued a "press release" to Associated Press. (Release was in bold type as appears in R. 9-13).

The conditions under which the trial on the merits was televised and broadcast appear in the Bill of Exceptions No. 5 (R. 8-21).

Defendant's Counsel at the trial made personal objections to the television of the trial and to photographs in the courtroom, because those activities seriously interfered with their ability to properly represent their client, and violated their personal code of ethics. Counsel considered asking to be relieved from the necessity and duty of defending the defendant in the courtroom in that trial, but reached the conclusion that such con-

duct might be misconstrued "as an effort to obtain some personal vindication and publicity in the trial" (R. 22-23 and 64-66).

The case was tried under conditions reflected by the record, and the jury retired. Soon after retiring the jury sent in a note inquiring whether it could convict defendant of all three counts in the indictment (R. 27-29).

The issue of television coverage (petitioner's Question 2 in the Petition for Certiorari) upon which review has been granted was timely and fully presented in both the trial and appellate Texas courts (Bills of Exceptions 5, 6, and 24, R. pp. 8-29; in the Texas appellate court, R. 135; 139-143).

OPINIONS BELOW

The opinion of the Court of Criminal Appeals upon original submission is printed in the record in so far as it bears upon the issue before this Court (R. 135-137; and upon rehearing, R. 143). The Texas appellate court approved the procedure below in part as supported by "Canon XXVIII of the Canons of Judicial Ethics since [*sic*] approved by the Judicial Section of the State Bar of Texas" (R. 137).

The original opinion was rendered by the Court of Criminal Appeals January 15, 1964 (R. 135). It is a matter of public and common knowledge that Texas Judicial Canon XXVIII was adopted September 27, 1963, and that by letter dated October 21, 1963, Judge Otis T. Dunagan (trial judge in the Estes case), secretary-treasurer of the Texas Judicial Section, transmitted a copy of the new Canon XXVIII to the Texas judges (7 South Tex. Law Journal [1964], p. 212). The Texas Canon is printed in Appendix, *infra*, pp. 48-49.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1257(3). The final entry of the judgment of the Texas Court of Criminal Appeals was on April 15, 1964 when that Court denied petitioner's second motion for rehearing which had been theretofore duly filed as permitted by Texas law. The Petition for Certiorari and the certified record were filed herein on July 7, 1964 within ninety days after such entry of such judgment of said state court of last resort.

CONSTITUTIONAL PROVISIONS AND STATUTES AND JUDICIAL CANONS INVOLVED

This review involves the First, Fifth, Sixth, Tenth, and Fourteenth (Sec. 1) Amendments to the Constitution of the United States; Fed. Rules of Crim. Procedure, Rule 53, 18 U.S.C.A., p. 499; Articles 1545, 1550, and 1421, Penal Code of Texas (1925); Canon 35, of the Canons of Judicial Ethics of the American Bar Association; and Canon XXVIII of the Canons of Judicial Ethics, approved by the Judicial Section of the Integrated State Bar of Texas (State Agency). These provisions are reprinted in Appendix, *infra*, pp. 45-49.

QUESTIONS PRESENTED

I. Does the action of a state court, over a defendant's continued objection, in requiring such defendant to submit to live television of his trial, and in refusing to adopt in an all out publicity case, as a rule of procedure, the standards as expressed by Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following Texas Canon XXVIII (adopted since the trial) of the Inte-

grated State Bar of Texas, constitute a deprivation of defendant's rights in violation of the Fourteenth Amendment?

II. Does a rule of practice required of a state court in a criminal trial, as a part of due process, in accordance with the standards recognized by Canon 35, abridge "the freedom of speech, or of the press", under the First Amendment, or deny a "public trial" under the Sixth Amendment, or conflict with any "ancient" and "established right of every citizen to attend a public trial", and to acquire knowledge, and speak, with reference thereto.

SUMMARY OF THE ARGUMENT

This case does not involve the imposition of an unconstitutional federalism upon the states. It involves procedural due process. Under the Tenth Amendment, substantive rights (not involving due process of law and equal protection of the laws) are reserved to the States.¹ But procedural matters, involving fair trial and equal protection of the laws, certainly since the adoption of the Fourteenth Amendment, are no longer matters exclusively "reserved" to the states.²

Canon 35 of the American Bar Association should be accepted by the Supreme Court as giving "expression to a standard which should govern the conduct of judicial proceedings". Canons of ethics adopted by bar associations do not have the effect of statutes, but are binding upon attorneys. The authority of the canons of ethics is derived, not from the fact that they are approved by a bar association, but because they are

¹*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 79-80.

²*Griffin v. Illinois*, 351 U.S. 12, 16-17; *Gideon v. Wainwright*, 372 U.S. 335, 341, and 346-349.

statements of principles and rules accepted and acknowledged by reputable attorneys and are recognized and applied by the courts in proper cases.

I. There is no question of balancing the rights of the defendant and the news media. The rights of the accused should take clear priority over considerations of reporting, because the guarantees of the first amendment, in relation to the judicial branch of our government, are inscribed in order that individuals may not be unjustly condemned; and the trial procedures that have no reasonable bearing upon the determination of his innocence or guilt are matters for the determination of the defendant and his counsel.

Television and live broadcast of a trial in no reasonable manner contribute to the determination of the defendant's innocence or guilt; and his objection to such procedure is reasonably supported, upon numerous grounds, such as: (1) the disruptive effect of photographers, cameras, and microphones; (2) a man accused of an offense, but presumed to be innocent, is entitled to reasonable protection in his person and privacy, and from commercialization of the helplessness of his unhappy position; (3) live television, radio, and photography result in lawyers, witnesses, jurors, and judges "playing to the audience", and encourage a public spectacle; (4) the accused may be prejudiced by the increased public clamor resulting from television and radio coverage; (5) if education of the public is a function of criminal trials, it is incidental, and the television and radio are basically ill equipped and unsuited to conduct such educational programs, because of their limitations in reporting, and necessary distortion by broadcasting of the sensational portions of the proceedings, or selections made from biased, or a planned,

point of view; (6) because of the necessary, and desirable, irresponsibility of the American free news media, in the sense of lack of "juridical" legitimacy, in arriving at an impartial determination of guilt and punishment; and (7) in so important a matter involving fair trial under the Fourteenth Amendment, a uniform rule is more desirable than separate and discretionary procedures by the several states.

Defendants are entitled to the services of adequate and effective counsel. Those things which inhibit counsel in rendering this service deny the defendant of a fair trial. In the exercise of this function, the rights and duties of counsel are supreme, and, in their proper sphere, transcend the power of the judge. An attorney exercising these functions has a right to refuse to permit the television of his client, in order to render effective service.

II. The right of the news media to gather and report a trial, and the right of the public to know, are inferior to the rights of the defendant and the state (prosecuting) to have a fair trial.

The right to obtain information and to know, as well as the right of citizens to attend public trial, are not expressly protected by the First and Sixth Amendments. It is conceded, however, that an unreasonable restriction upon obtaining information by the public would be fairly included in the abridgement of free speech, and of the press, proscribed by the First Amendment. Although the Sixth Amendment "right to a speedy and public trial" is a guarantee to the accused

"Juridical", as used here, means simply the "free press" being regarded from the legal point of view, judged by a legal standard. See: *Giorgio Del Vecchio (Campbell's Edinburgh Edition 1956), "The Problem of Justice." Introduction, p. xiv.*

alone, there is a well established right, of "ancient" origin, in every citizen to attend a public trial. But this right (of attendance) is not to be exercised in violation of the rights of the defendant to a fair trial, or to the prejudice of due and orderly procedure.

The standards of conduct as expressed by Canon 35, and in Federal Rule of Criminal Procedure No. 53, do not abridge freedom of speech, and of the press, and do not deny the right of citizens to attend public trials, but are acceptable standards in relation to First and Sixth Amendment guarantees, as demonstrated by the following:

(1) Forty-eight states of the Union now follow and enforce the standards as expressed by Canon 35;

(2) Under Rule 53 all federal courts in the United States enforce the standards as expressed by Canon 35;

(3) The extension of the standards of Canon 35 and Federal Rule 53 to Texas and Colorado state trial courts will not create an abridgement of the right to obtain information and to report such information, and to express an opinion thereon;

(4) The right to obtain information is a part of freedom of speech, which by its very nature involves acts and conduct, which must be subject to some character of regulation and control;

(5) The presence of the press and other news media reporters does not present such a psychological barrier to the ascertainment of truth as do the radio and television; and

(6) The possibility of the exercise of other suggested controls raise more serious constitutional questions as to "abridgement", and increase the danger of interference by the courts with the right to know and to speak.

ARGUMENT

I. *Due process of law includes the concept that a defendant may not be needlessly humiliated and commercially exhibited, over his objection, and required to submit to any trial procedure or technique which does not bear some fair and reasonable relation to the ascertainment of his innocence or guilt:*

1. "The truth-finding purpose of the trial, its *raison d'être*, will have been intolerably impaired";^{*} if any other criteria be accepted in a defendant's trial, than a fair determination of his innocence or guilt. The resort to the "market place" for a solution of the judicial function is unacceptable in a free country.^{*} A "righteous judgment" is not to be made "according to the appearance", but it is part of man's ancient faith that he be not judged by law, "before it hear him, and know what" he has done.^{*} The scientific and economic materialism of "The Great Society" cannot ignore the spiritual values in a democracy, represented by fair and equal justice to an accused. We would repudiate any suggestion that even the "right to think", and the "right to speak", transcend, or even parallel, the "right to live and to be free".^{*} We would deny, in any "sense",

^{*}Quoted from *215 Atlantic* (January 1965), p. 63, Judge Kaufman (2d Cir., C.A.), "*The Uncertain Criminal Law, Rights, Wrongs, and Doubts.*"

^{*}Justice Frankfurter, *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920; Justice Black (dissenting opinion), *Cox v. Louisiana* (Sup. Ct. No. 49), Jan. 18, 1965, 33 L.W. 4112, not yet otherwise reported.

^{*}*Gospel of St. John*, Ch. 7, verses 24 and 51.

^{*}Justice Clark in concurring in *Gideon v. Wainwright*, 372 U.S. 335, 349, points out that "liberty" is protected by due process, as well as "life", and that "there may be no difference in the quality of the process" based upon a different sanction.

that the law, which measures "legal liability by moral standards", by very necessity of its nature "is continually transmuting these moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated".

In Justice's Armageddon, if freedom is lost, it will profit mankind little that the loss of his liberty is heralded by the "channels" and the "networks"; nor did it profit the citizens of Poland that the last clarion of their doom, into slavery, was the voice of radio Warsaw.

It is not a question of balancing the rights of the public and the news media with the rights of the defendant. "One might as well speak of the judge in a courtroom (that is, Judge Dunagan, under the Texas Canon XXVIII) as balanced against the defendant."

"The institutional imperatives of federalism", Judge Kaufman says, "which had traditionally dictated deference to the states in our system of dual sovereignty, have become subordinated to the moral imperatives of the Constitution."¹⁰ The public (of which the news

Mr. Warren Freedman, of the New York Bar, in 40 Neb. Law Rev. 391, 405, in his article, *News Media Coverage of Criminal Cases and the Right to a Fair Trial*, says: "In summary, it is submitted that the rights of the accused should take clear priority over freedom of the press."

The "right to think" and "to speak", of which the "free press" is a part, are rather "means" in a democracy by which the freedom of individual citizens is "institutionalized". See, Miller (University of Texas Press, 1959) *Modern Science and Human Freedom*, pp. 146 and 208.

⁹Holmes, *The Common Law*, Lect. I, the last sentence (Boston 1938, 31st Printing), p. 38.

¹⁰Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Bros. 1948), p. 69, also pp. 67-70, replying to Mr. Chafee's suggestion of balancing.

¹¹Note 4, *Ibid.*, p. 61, 62.

media are a part) has an important responsibility to share in the burden of shaping our rules of procedure, by which our civilization will be judged. And justice, which we are seeking, "is not merely the justice that one receives when his rights and duties are determined by law as it is; what we are seeking is the justice to which the law in its making should conform".¹¹

The basis of due process in the Fourteenth Amendment was to implement a system of federalism in procedural fairness throughout the several states and a uniform justice for all citizens of the United States. It has been said that in "earliest literature" the idea has been advanced, "that the nature of justice is essentially social, and that its true and proper manifestations are found only where the acts and the claims of several persons meet, and its specific function is to establish between these their due limits and harmonious proportion".¹²

The fact that in this case the "mechanical monstrosities of television",¹³ after the preliminary hearing before the court for continuance or change of venue, were somewhat cleaned up for the trial on the merits, is of small significance. "The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial."¹⁴

We have found no responsible critic who has yet argued that the television and broadcasting of court

¹¹Cardozo, *The Growth of the Law* (New Haven, ~1927), p. 87.

¹²Note 3, *Ibid.*, p. 42.

¹³Arthur Krock, speaking of the National Conventions, *New York Times Service, The Austin American*, Jan. 14, 1965.

¹⁴*Cox v. Louisiana* (Sup. Ct. 49), January 18, 1965, 33 L.W. 4105, 4106, not yet otherwise reported.

proceedings are likely to aid and assist in the ascertainment of truth in a particular trial. On the contrary, the long experience of the legal profession and of the judiciary has demonstrated that the injection into judicial proceedings of these outside and foreign elements is likely to interfere with the search for truth. Actual showing of prejudice possibly may not be shown in some cases (though the record in this case certainly reflects it), but it is enough to condemn the practice if there is a real possibility this may be the occasional result. Federalism demands that a defendant's federal rights be violated before the Supreme Court can interfere with his state conviction; and lack of clarity in the federal constitutional standards of impartiality increases the difficulty of discerning whether or not a defendant's rights were in fact violated.¹⁵

The defendant, the lawyers, the state or commonwealth, the jury, even the judges, each and all are restricted by definite and positive rules of conduct. Surely, the members of the general public and the news media, non-participants in the actual trial, should and can have no greater rights.

The argument is often advanced with some surface plausibility that technological improvements in television and photography have now made the inhibitions of Canon 35 outdated; and that under ideal circumstances and with ideal equipment in the hands of the most competent technicians noiseless photography is

¹⁵Since the Supreme Court does not sit to correct error in state court decisions, right of appeal based upon prejudice is a wholly inadequate method of enforcing a recognized standard of fair trial. See, *Comments, The Case Against Trial by Newspaper; Analysis and Proposal*, 57 Northwestern Law Rev., 217, 220-221; also, 63 Michigan Law Rev., 174, 176-177.

possible (as contended by the prosecution in this case, R. 93). This is the most the media assert.¹⁶

But the noise and confusion are not the sole, nor even the principal objection. The psychological disturbance is nonetheless present and often is more potent and disturbing than the turbulent and noisy intrusions. "The more dangerous gases are those without odor."¹⁷

Profs. Paulsen and Kadish, in their text (Little Brown & Co., 1962), *Criminal Law and Its Processes*, p. 1076, say, "unfortunately much of the de-

¹⁶See: Judge J. Skelly Wright, *A Judge's View: The News Media and Criminal Justice*, 50 A.B.A.J., December 1964, pp. 1125-1129, and Mr. John Charles Daly, *Ensuring Fair Trials and a Free Press: A Task for the Press and the Bar Alike*, 50 A.B.A.J., November 1964, pp. 1037-1042.

It will be noted that Judge Wright, at p. 1127 states, "initially at least, the permission of the defendant should be required before any television coverage of a trial is allowed."

Mr. Daly, pp. 1041-1042, says, "let us have an end to this nonsense that cameras and microphones make circuses of courtrooms." (i.e., Mr. Justice Douglas, speaking at the University of New Hampshire, 1960: "The trial is as much of a spectacle as if it were held in the Yankee Stadium or the Roman Coliseum"; and quoting Juvenal who wrote "Two things only the people anxiously desire—bread and circuses"; Douglas, *The Public Trial and the Free Press*, 46 A.B.A.Jour., (1960) p. 840 and Mr. Arthur Krock, *supra*, note 13.

¹⁷The quotation is from the splendid article by Hicks Epton, Esq., of the Oklahoma bar, which was published in the "Sooner Magazine," February 1960, p. 16. The assistance of Mr. Epton in preparing our Brief is acknowledged, and has been invaluable. He was one of the Counsel who succeeded in persuading the adoption on September 30, 1960, by the Supreme Court of Oklahoma, of the standards of Canon 35, for trials in that state. Mr. Epton served as a member of the A.B.A. Special Committee recommending the retention of Canon 35, which recommendation was adopted by the A.B.A., and had the unanimous commendation of the Judicial Conference of the United States. See, *Report of Special Committee*, p. 6. Mr. Epton's article was cited and quoted by Mr. Justice Douglas, in his article, Note 16, *supra*, 46 A.B.A.Jour., 840, 843.

fense made for the Canon and the Rule rests upon the disruptive effect of photographs, cameras and microphones in the courtroom". Other reasons, they point out, are more serious. They then outline some of the objections that petitioner has outlined in his Summary in this Brief.

These writers discuss *Lyles v. Oklahoma*, 330 P. 2d 734, and point out that in that case, after "the defendants objected to taking further pictures, the trial court ordered no further pictures to be taken" (330 Pac. 2d, at p. 738).

The defendant's right to object to television is the vital consideration that the Texas and the Colorado rules, respectively, ignore. It would seem that no defendant, properly advised, would submit to television of his trial. Guilty defendants would avoid photographing against future identification. Innocent defendants would object to its humiliation and publicity. For this reason, the two so-called discretionary states have deliberately drawn their state canons so as to circumvent the possibility of the defendant or his counsel throwing a "monkey wrench" in the "works". In Texas, to permit a defendant, or his attorney, to stand up in the courtroom "theatre", "shouting" "foul" is strictly regarded "to create a clear and present danger".

Certainly it would appear that the Texas Canon was so deliberately drawn, to bolster up the conduct of the trial Judge (secretary-treasurer of the Texas Judicial Conference) in his prior ruling in this Estes case; the trial Judge, who did not hesitate to announce that he had taken an oath to support the "Texas Constitution, not the Federal Constitution" (R. 105, second paragraph).

Such difficulties in orderly proceedings in the state courts have received official recognition. Mr. Orfield, a member of the Supreme Court committee to formulate and recommend the Federal Criminal Procedure Rules, said as to Rule 53 (formerly Rule 49, adopted 1940, effective 1945): "While the matter to which the rule refers has not been a problem in the federal courts as it has been in some state tribunals, the rule was nevertheless included with a view of giving expression to a standard which should govern the conduct of judicial proceedings."¹⁸

In the Special Committee Report, 62 A.B.A. Rep. (1937) 851, 862-865, the lawyer members of the committee believed in several provisions with reference to the rule.

They believed that "the consent of counsel for the accused in criminal cases and of counsel for both parties in civil suits should be required to be secured".

The newspaper representatives opposed this.

The lawyer members of the committee among other aspects considered that pictures of the accused, taken without his consent, and of witnesses, who are obliged to be present, often under circumstances of great emotional distress, seem to impose an unnecessary hardship upon the doing of a duty which society commands.

¹⁸Orfield, 22 Texas L.R. 194; Robbins, 21 A.B.A. Jour. 301-304. See also, Report of the Special Committee on Cooperation between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings (1937) 62 A.B.A.Rep. 851, 862-865; (1932) 18 A.B.A.Jour. 762; (1926) 12 Id. 488; (1925) 11 Id. 64.

The Supreme Court has not passed upon the extent to which Canon 35, and Fed. Rule 53 (18 U.S.C.A., p. 499) give "expression to a standard which should govern the conduct of judicial proceedings". See, *Barron, Federal Practice and Procedure*, Rule Edition, 878.

It was noted that "the right of personal privacy is very little respected in America". To the entire lawyer delegation, it seemed an unjustifiable addition to the defendant's distress that he should be photographed against his will, pictured in the Press, and his personal appearance and clothes made the subject of gossiping comment. Those who desire this sort of publicity usually find some method to obtain it, while a defendant and his counsel who shrink from it can find no method of avoiding it unless their rights are respected by the Press and protected by the court. To these lawyers (among whom was the late, great advocate, Mr. Newton D. Baker) it seemed too much to hope that the lawyers and witnesses can do their full duty to the court and at the same time be effective actors in the highly specialized art of broadcast drama (Report of 1937 Committee pp. 862-864).

"The entire concept", it has been said, "of our criminal law, that a man is innocent until proven guilty beyond a reasonable doubt, is in jeopardy of being replaced by a new concept of guilt based on inquisitorial devices" (i.e. television)."

If the foregoing statement may be considered strong, certainly it may be said with restraint that the idea that, because a man has been suspected of a crime, or accused of one, he becomes a public character, subjecting himself to being exploited by the news media, and for educational purposes, and commercialized for the sale of soft drinks, soap, and soup (R. 84-85); and as

¹⁰*Temp. L.Q.*, 70, 78, quoted by Justice Douglas in 46 A.B.A.Jour., 843. Justice Douglas adds on the same page, "One shudders to think what could be the result in trials having a political cast (as did Estes)—where the accused is unpopular, where the charge is inflammatory."

a substitute for the late (T.V.) show (R. 87); violates basic standards of fair trial.

Commercial sponsorship of such broadcasts may certainly be said to cheapen and vulgarize processes of government that should be "sacrosanct". Justice requires that in every social relation there should be presupposed an original "right to solitude". And while this may be "an ideal" concept, it is no "ideal concept" that "liberty" is essentially inborn in every man, and that each one has therefore in relation to others a "natural right" to liberty; that amongst men there is not, as regards this right, any difference, but rather a perfect equality; "that everyone may claim from others respect for his own physical and moral integrity".²⁰

It is a trial court's duty to protect the right of an accused's privacy. The right of freedom of speech was not intended to destroy all rights of privacy and secrecy. There is no constitutional right of access, whether public or private, with the object of securing information for the purpose of printing it.²¹ Neither the press nor the public are entitled to take advantage of the defendant's involuntary exposure at the bar of justice to employ photographic means to picture his plight in the toils of the law, either while in jail, going or coming from court, or while actually in the courtroom. A defendant has no remedy against false reporting of a trial by the news media, because undoubtedly there is an absolute privilege from civil or criminal libel. (*New York Times v. Sullivan*, 376 U.S. 254;

²⁰Note 3, *Ibid.*, pp. 116 and 117.

²¹*Tribune Review Publishing Co. v. Thomas*, (U.S.D.C., W.D. Pa.) 153 F. Supp. 486, 495, affirmed 254 F.2d 883; *United Press Ass'ns v. Valente, Judge*, (Supreme Ct., N.Y. County) 120 N.Y. Supp. 642, affirmed (App. Div.) 120 N.Y. Supp. 174; 308 N.Y. 71, 123 N.E.2d 777.

271-272; *Garrison v. Louisiana*, decided November 23, 1964, No. 4-October Term, 33 L.W. 4019.)

Privacy of the accused is an important consideration. But where cameras are openly displayed in a courtroom, or a special booth is built in the rear, the courtroom becomes a theatre "set". It is the fact of photography, the fact that the intrusion is present, the fact that all the principals to the trial, judge, witnesses, lawyers, jury, are "on stage" which is inescapably distracting from the task at hand. It is the fact that these participants are made actors which is dangerous to the defendant's rights. If unwilling actors, then their essential dignity as human beings is violated. If willing actors, then those courtroom "thespians" are far more dangerous to the liberty of the accused, because their principal concern will not be compliance with their oaths, but the question of their effectiveness as actors. The manner or method of making them actors is beside the point. By the resulting spectacle, both the courtroom and the news media are degraded.

"The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself, and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become overconcerned with the impression their actions, rulings or testimony will make on the absent multitude."³³

Canon 35, and, Fed. Crim. Rule 53, and the policy expressed therein, are the outgrowth of years of thought and work by lawyers and the courts. During

³³Report of a special Committee of the American Bar Association (1952), of which the late great John W. Davis was the head. 77 A.B.A.Rep. 607.

the years which have followed since the close of the First World War, which gave us the radio—as the Second World War was to give us television—a series of notable cases has made lawyers and judges conscious of the growing danger to human rights in courtroom reporting. Articles in 11 A.B.A. Jour. (1925), p. 64; 12 A.B.A. Jour., (1926), p. 488; and 21 A.B.A. Jour., 301; are among the early articles expressing this concern.

The expectation and hope for self-restraint, control, and regulation by the news media itself has been discouraging. We believe it is not a harsh and unfair comment to say that the news media are wholly unable to point to an instance of reporting the trial of any famous and notorious accused in the last forty years," where the treatment has been so restrained, self-controlled, and objective, as to entitle the media to freedom from censure. The generation that has lived throughout all the years that have passed in this century recognizes in the Oswald and Ruby incidents unusual and aggravated examples, but unhappily they may not be said to be unique. The "*Warren Report*" has placed, at least, "a part of the responsibility for the unfortunate circumstances following the (late) President's death upon the news media". The report concludes: "The burden of insuring that appropriate action is taken to establish ethical standards of conduct for the news media must also be borne, how-

²²In *Cox v. Louisiana*, (Sup. Ct.) decided Jan. 18, 1965, 33 L.W. 4113, not officially reported, concurring in No. 24, Justice Black points to the history of the past 25 years demonstrating that "constitutional and statutory rights have to be protected by the courts, which must be kept free from intimidation and coercive pressures of any kind"; and Justice Clark, concurring says, "The contemporary drive for personal liberty can only be successful when conducted within the framework of due process of law" (33 L.W. 4114).

ever, by State and local governments, by the bar, and ultimately by the public. The experience in Dallas during November 22-24 is a dramatic affirmation of the need for steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial."²⁴

Trial and punishment naturally, in limits, have a certain pedagogical and educative purpose and effect,²⁵ but this purpose is in no sense effectively served by live television of criminal trials. The *complacency* of the news-media has, too often in state trials, been matched only by the *complaisance* of the judge.

The end in our modern planned society is not that the "Society" shall enjoy an *image* of "greatness", but that it shall bring each man and woman a measure of *good*, which individual justice alone can insure. A "*Just State*"²⁶ is the end, rather than a beautiful state.

"To treat trials as mere entertainment, educational or otherwise, is to deprive the court of the dignity which pertains to it and can only impede that serious quest for truth for which all judicial forums are established."²⁷

"The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won

²⁴*Report Volume* (President's Commission), pp. 240 and 242.

²⁵There are contrary philosophical views upon the nature of the criminal act and purposes of punishment. See; Note 8, Holmes, "*The Common Law*," Lecture I; Del Vecchio, "*Justice*" (Campbell, Edinburgh Press, 1956), p. 2, and 183-184; Hall, *General Principles of Criminal Law*, (Second Ed. 1960), Bobbs-Merrill Co., Ch. V, pp. 146-170; and Ch. X, 325-351.

²⁶Note 3, *Ibid.*, pp. 118-119.

²⁷Note 22, *supra*.

through the use of the meeting hall, the radio, and the newspaper."²²

In the summary at the beginning of this Brief, it was stated that the "free news media" lacked responsibility in judging and determining guilt and punishment for an accused. This is one of the strengths of our society, that under the protection of the First Amendment, in the forming of their opinions, the news media may not be corrected and guided. Their freedom, and that of the people, in forming and expressing their opinions, is subject to no sovereignty, other than their own conscience.

The public, however, we have said, have an important responsibility, acting through elected representatives, to share the burden in shaping the rules of criminal procedure by which our civilization will be judged. The representatives who pass the law, the executive who administers them, the judges who sit in the courts to enforce them, the court officials, the lawyers, the witnesses, the jurors, and the court reporter, all make

²²Frank, (Knopp, 1949) *Mr. Justice Black, The Man and His Opinions*, p. 290.

²³Thomas Jefferson said: "I will add that the man who never looks into a newspaper is better informed than he who reads them, inasmuch as he who knows nothing is nearer to truth than he whose mind is filled with falsehoods and errors. He who reads nothing will still learn the great facts, and the details are all false. Perhaps an editor might begin a reformation in some such way as this: divide his paper into four chapters, heading the first, Truths, 2nd, Probabilities, 3rd, Possibilities, 4th, Lies." *Letter of Thomas Jefferson to John Norvell*, June 11, 1807: McCormick and MacInnes, "Versions of Censorship" (Aldine Pub. Co., 1962), pp. 129-130.

This is not the nature of "irresponsibility" to which petitioner refers in his Brief; nor do his counsel subscribe wholeheartedly to Mr. Jefferson's castigation. However, our Democratic Founder's suggestion for "reformation" is worthy of the consideration of the media.

their contribution, respectively, to the legislative, executive, and the judicial functions, under the responsibility of which each has assumed under the sanction of his oath.

In all this, which constitutes a "just state", the news media have a part to search out information, to inform, to urge, to criticize, but they have no responsibility, nor legitimate part, in deciding, adopting, administering, and judging.

The media would be outraged indeed if their representatives at the beginning of a trial were required to stand and be sworn with the witnesses to report "the truth, and nothing but the truth", and instructed not to talk to each other, or with anyone, about the facts of the case. We can imagine their distress when such "censorship", as an Holmesian "fiend", began griping at the "entrials" of their cherished freedoms."

The tremendous expense involved in live television in reporting trials, as demonstrated by this record, makes it impossible for television to report any, but the most noted and sensational cases; and then only portions of those.²¹ Trials at best, except for those who live in the law, are more often exceedingly dull. The participants' dress and make up, as a rule, are somber and reflect a poor *image* on the screen. The ordinary lawyer's one "blue serge suit", which he reserves for court, church, weddings, and funerals, has a tendency, as his practice progresses, to embarrassingly reflect in the "kleig lights"; or at least, he thinks so. That he

²⁰Counsel use the participle of the "active" and "transitive" verb "gripe" advisedly. See, "Third New International Dictionary".

²¹Tinkham, *The Bar and Canon* 35, 19 F.R.D. 19, at p. 23; Judge Holtzoff, *Presiding Panel Discussion*, 19 F.R.D. 16, par. 3.

should have to think of those considerations, while trying his case, and have to face renewed and uxorious arguments, when he goes home wearily at night, of the necessity of a new suit, is intolerable.

In matters involving due process, or any of the first ten amendments, which may be deemed "the privileges and immunities of citizens of the United States" protected from abridgement by state law, there exists a desirability toward uniformity."

The careful study by the American Bar given to the principles of Canon 35, and its overwhelming retention by the American Bar Association, and the practice in the federal courts as an absolute requirement by Criminal Rule 53, and the requirement or acceptance of these standards by forty-eight states in state trials, confirm the conclusion that such standards are unequivocally bound to fair trial and proper judicial decorum.

The dictates of federalism, in our opinion, do not "dilute, denigrate, or diminish" the quality of due process, as expressed by Canon 35, because two of the states in their trial courts permit the discretion of the court to overrule the objections of the defendant and his counsel. It makes little sense to argue that broadcasts by news media are considered inimical to a fair hearing in all federal courts, in all courts of forty-eight states, and in the appellate courts of Texas and Colorado, but they are not so inimical, if the broadcasts come from the trial courts of those two states.

It is believed that the discretionary rule of Texas and Colorado, as expressed by their respective state

²²"Happily, all constitutional questions are always open." See, Mr. Justice Douglas, *Gideon v. Wainwright*, 372 U.S., at p. 346. By *uniformity* is not meant *rigidity*.

canons, has not been, and will not be, properly administered so as to assure the Fourteenth Amendment's requirements of due process and equal protection of the laws in state criminal cases, nor so as to achieve those basic constitutional objectives. The overwhelming evidence is that the application of the discretionary rule of Texas Canon XXVIII,³³ with due respect to the Texas Judicial Section (of elective judges), and for the separate processes of the state, is not an appropriate adaptation of the Fourteenth Amendment to the demands of federalism. On the contrary, the application of the discretionary rule will compel continual federal review by *certiorari* and *habeas corpus* of state criminal proceedings, where the discretion has been exercised and television permitted,—not on the basis of applying a concrete, uniform principle, but by the corrosive and irritating process of case by case review.³⁴ It is unthinkable that in every criminal case from Texas and Colorado, and from those two states alone, where the trial court exercised its discretion and permitted television of a trial and was sustained by the highest courts of those states, the case would have to be reviewed by some federal court.³⁵

³³i.e., *Estes*, *Oswald*, and *Ruby* cases. The news media in seeking through this Court's decision to remove the restraints of Canon 35 from the state courts, then the "victors" in sustaining the discretionary rule, will only become "victors busy fastening on themselves the (claimed) chains they have struck from the limbs of the vanquished" (Shaw, "Heartbreak House", *Complete Plays*, 1962, Vol. 1, p. 476).

³⁴This is strikingly illustrated by the Supreme Court's overruling *Betts v. Brady*, 316 U.S. 455 (1942), by the opinion in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the adoption of a uniform requirement of counsel in place of a discretionary rule in force in a few of the states.

³⁵The burden would be aggravated because television would be used by the news media in those famous cases where the record would tend to be longer. "The very essence of a healthy

We do not believe it is necessary to "dilute, denigrate, or diminish" the quality of due process in protection of an accused from the evils of television and radio broadcast of his trial in deference to Texas and Colorado, which continue to defy what is almost universally accepted by lawyers and judges as the proprieties of criminal justice and the rights of the accused.

As the miracle of the radio and television presented itself to the world, its influence in the molding of thought to a conformity, "blueprinted" in "Madison Avenue", was early recognized by lawyers and judges, and the thinkers who mold and shape our jurisprudence. They did not act hastily, but, with no personal interests involved, commercial or otherwise, other than the "rights" which the people enjoy and the "wrongs" which the "law redresses",³⁶ they became imbued with "a quiet and rational persuasion"³⁷ that justice in our courts could not be fairly administered under the dictation and coercion of a "mass"³⁸ induced conformity in the public's opinion, as to an accused's innocence or guilt. From this "persuasion" a canon was formed,³⁹ and a rule was adopted. And the conclusions of those wise lawyers, over a half century, have been accepted by all but a few of those trained in our profession, as aiding and contributing to the attainment

federalism depends upon avoidance of needless conflict between state and federal courts." Mr. Justice Stewart in *Elkins v. United States*, 364 U.S. 221 (1960).

³⁶III Blackstone, Ch. I, pp. 1-2.

³⁷DeTocqueville, *Democracy in America*, (1st Eng. Ed.), p. XXVI.

³⁸Douglas, *The Public Trial and the Free Press*, 46 A.B.A. Jour., August 1960, 840, at p. 844.

³⁹The original canon was adopted in 1937 as the result of that "three ring circus" known as the Hauptman trial. 19 F.R.D. 20.

of substantial justice; and have in main, proved satisfactory to both lawyers and the media.

Certainly upon the standards of Canon 35 there is far less contrariety of view among lawyers, judges, and the states than there was on the exclusion of illegal evidence⁴⁰ and upon the necessity of the appointment of counsel for indigent defendants.⁴¹

2. A defendant in every case is entitled to adequate counsel, and to the undivided attention and help of such counsel.⁴² He requires this careful, undivided, guiding hand of counsel at every step in the proceedings against him. Without it, though the defendant be not guilty, he faces danger of conviction because he does not know how to establish his innocence.

For the attorney, the responsibility is a serious one. Few lawyers are interested in the image they cast upon a screen. Their interest is the image in which their client is cast before the court and the jury. In forming that image, as to those things not bearing on his innocence, his guilt, or his punishment, the lawyer is supreme, bound by his ethical standards, and his own integrity. "Attorneys are officers of the Court. They are members of an ancient profession whose members have the unique privilege, and corresponding responsibility, of being essentially the sole judges of the propriety of fellow members conduct."⁴³ The standards by which they are judged are canons of our profession. They do not prescribe. They recount,—recount the con-

⁴⁰*Mapp v. Ohio*, 367 U.S. 643.

⁴¹*Gideon v. Wainwright*, 372 U.S. 335.

⁴²*Gideon v. Wainwright*, 372 U.S. 335; *Johnson v. Zerbst*, 304 U.S. 458; *Grosjean v. American Express Co.*, 297 U.S. 233, 244; *Powell v. Alabama*, 287 U.S. 45, 68, 69.

⁴³Justice Greenhill in, *Dow Chemical Co. v. Benton*, (Tex. Sup.) 357 S.W.2d 565, 567.

duct of great advocates from the days of Papinian and Ulpian. Because of the manner in which they have come to us, they do not change. One does not smell one's socks to see if they need to be changed. If there is doubt, one changes them. So too, a lawyer does not judge his conduct by looking it up in the canons. If there be doubt, he makes the decision against himself. Lawyers know what conduct is proper in a trial. And lawyers know that televised and radio broadcasts from the courtroom trial are improper.

A lawyer is an instrument and agency to advance the ends of justice, and he is as independent as the judge.⁴⁴ If the television of his client's case will, in his opinion, prejudice his client's case, it is his duty to protest; and he should be entitled to object to any procedure which embarrasses, humiliates, and degrades him, according to his personal ethics, and the ethics of his profession.⁴⁵ The problem involved in Canon 35, in its depth, goes beneath any idea of a regulatory rule, to an ethical concept which does not change with the times.

That the rights of attorneys at times transcend those of the court has been recognized. Within the last few weeks it has been held by a United States Court of Appeals, sitting en banc, that a district judge may not direct and require a United States District Attorney to violate his conscience and to prepare and sign an indictment though duly returned by a grand jury.⁴⁶ Counsel for petitioner express no opinion upon the correctness of that decision, but if there be no duty

⁴⁴7 American Jur. 2d, *Attorneys at Law*, Sec. 3, p. 45.

⁴⁵Testimony of counsel, R. 64-66.

⁴⁶*United States v. Cox*, (5th Cir., en banc) decided January 26, 1965; 33 L.W. 2387.

upon the part of the Department of Justice, and a district attorney, to prepare and sign an indictment against his conscience, then surely no duty rests upon a defendant's counsel to defend, against his ethics and the ethics accepted by his fellow lawyers, and against what he believes to be right and fair.

In matters of this kind, the decision of the attorney for the defendant must necessarily be final. It cannot be left to the discretion of the judge, because it is a matter personal to the defendant. The judge cannot act as both judge and attorney for defendant. His functions are purely judicial, and he cannot effectively discharge the obligations of counsel for accused (See, *Powell v. Alabama*, note 31, *supra*).

Mr. Sean Mac Bride, Secretary-General of the International Commission of Jurists, an association of 40,000 judges, lawyers, and law professors of more than sixty non-Communist countries, said recently: "Lawyers have a sacred duty to preserve the physical, moral and intellectual integrity of human beings." "Freedom of counsel to conduct his client's defense, and to make decisions for his client, free from the dictation of the court, are essential if attorneys are to stand like Erskine, unafraid before the bench, confident in their duty to their client, and the Law of the Land."

In early law "notorious criminals" were not allowed advocates," and the progress of our law from the *Institutes* to *Gideon* has been the brightest guide light of man toward a more civilized society.

II. A rule of practice in accordance with the stand-

⁸⁵*Time*, January 15, 1965, p. 41.

⁸⁶*Cooper's Justinian* (1812 Ed.), Notes, p. 598.

ards expressed in Canon 35 does not abridge "freedom of speech, or of the press", or deny a "public trial":

It is thought that no responsible authority, either judicial or from the news media, has ever sought to question this "larger scope" of the right to a fair trial over the First and Sixth Amendment guarantees. "The rights at issue are, on the one hand, the right to a fair trial and, on the other, the public's right to know." "When the public's right to know extends to opinions or observations that could be prejudicial to a fair trial, it is no longer a right but a wrong."⁹ Though the view here expressed has been called "remarkable", and even "asinine" by news media,¹⁰ the considered consensus, both of informed lawyers and publicists, is that between "fair trial" and "free press" there is no problem of "balancing", because a trial is not held to furnish material and information for the news media to report, but "free news media" exist, as one of their purposes, to insure due process in a trial, and to conduct their news gathering activities in such a manner as not to endanger a fair trial.

The hazard presented by television of executive and

⁹*The Wall Street Journal*, Editorial, "Standards for the Courts," August 14, 1964; Walter Lippman, *The Public Philosophy*, p. 20; *Shepherd v. Florida*, 341 U.S. 53; *In re Hearings Concerning Canons of Judicial Ethics*, 132 Colo. 591, 296 P.2d 465, 467; address of Lewis F. Powell, Jr., President of the American Bar Association, "The Right of a Fair Trial", at Houston (reported in full in *The Austin American*, December 22, 1965, p. 4); and see, Freedman, *News Media Coverage of Criminal Cases and the Right to a Fair Trial*, 40 Neb. Law Rev., 391, at p. 405.

¹⁰*The Austin American*, January 6, 1965, p. 4; and Editor and Publisher, "the newspaper world's foremost trade magazine", quoted in *The Austin American Editorial*, p. 4, sixth paragraph.

administrative interviews has been pointed out by a leading Washington correspondent.⁵¹

If this Court is to resolve any supposed conflict between "freedom of speech, and of the press", and the due process protected by the Fourteenth Amendment, the purposes of the two protective provisions must be considered, and not the one provision alone.⁵² This involves the nature of "free speech", and the meaning of "abridge".⁵³

In the days just before the adoption of the first ten

⁵¹Mr. Leslie Carpenter, under a Washington by-line, recently wrote, as to Presidential news conferences: "Also television moved in, and that compounded difficulties. It stirred the hams and the kooks of the trade to new lengths to get in a question and get on camera." *The Austin American-Statesman*, February 14, 1965.

Regrettably, if we understand the meaning of the word "kook", and we think we do, we must confess that a profession, too, has its "hams and kooks."

⁵²*United States v. Classic*, 313 U.S. 299, 317-318.

⁵³Efforts to rationalize freedom of speech have been attempted by many thinkers. In Germany the great Rudolf von Jhering in his "Confidential Letters" held that free speech was "derivative of the individual's right of property in his means of speech—freedom of the tongue." For example, "when you scratch yourself, you exercise a property right." Seagle, "Men of Law From Hummurabi to Holmes", (Macmillan 1948), p. 319 (Quaere: May it be exercised in public, or standing up in a theatre?) Compare Professor Meiklejohn's property theory, pp. 58-60.

Mr. Charles L. Black says: "It is not to give a 'preferred position' to one right over another, but to note that one right is, as a substantive matter, of an altogether larger scope than another." *The People and the Court*, p. 221.

Judge Holtzoff (D.C.D.C.), presiding over *Panel Discussion*, 19 F.R.D. 17, at p. 18, par. 1.

Justice Black recently repeated his views on balancing: "I have previously had a number of occasions to dissent from judgments of this Court balancing away the First Amendment's unequivocally guaranteed rights of free speech, press, assembly and petition"; dissenting in *City of El Paso v. Simmons*, (No. 38) decided January 18, 1965, 33 L.W. 4126, at p. 4132.

amendments there were some who did not join with George Mason in his apprehensions over the adoption of the Constitution. In the original constitution "free speech" was not mentioned. Between Justice Holmes and Professor Meiklejohn, and "clear and present" danger, we have conflicts of views, but they have no bearing on this case. As we understand the law, both Professor Meiklejohn and Professor Chafee, and all teachers and authorities, agree that there are times at which men may not speak, and when they may not insist upon obtaining information.

"Free speech" is identical with "free press" and includes all character of human communication, and it includes "utterances" and "acts" to obtain information. "We, (may often) find exaggeration in the

"In the Federalist, No. LXXXIV, Hamilton said: "What signifies a declaration, that 'the liberty of press shall be inviolably preserved?' What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government."

"It seems significant that, having fostered "clear and present danger" upon our law in *Schenck v. United States*, 249 U.S. 47, 52, Justice Holmes, neither in *Abrams v. United States*, 250 U.S. 616, 624-631,—nor seldom later,—was able to discover the presence of "a clear and present danger"; nor is there any record that he ever caught a man who stood up, "falsely shouting fire in a theatre".

"Meiklejohn, *Free Speech and Its Relation to Government*, p. 22; Chafee, *Free Speech in the United States*, reprinted in McCormick and MacInnes, *Versions of Censorship*, (Aldine 1962); p. 172; Charles L. Black, Jr., *The People and the Court*, (Macmillan 1960), p. 217-218; Mr. Justice Black, on "fair trial," *Gideon v. Wainwright*, 372 U.S. 335, at p. 344; and Justice Harlan, the "front-line responsibility" on the state courts "for the enforcement of constitutional rights", *ibid.*, p. 351.

"*Thomas v. Collins*, 323 U.S. 516.

conclusion that the utterance even 'tended' to interfere with justice.'" But with television in the courtroom the problem does not involve "utterance", it involves the exercise of that part of "free speech" which includes acts and finding out what to talk about."

There is splendid authority holding that the First Amendment guarantee is freedom "to speak", and that it does not prohibit "abridgment" of the right to obtain information."

Counsel are unwilling to accept a construction of the first amendment guarantees which includes only the right to speak, and not the correlative right "to know". Of the English people it has been said, "with Milton that they desired the liberty to know, to utter and to argue freely, according to conscience, above all liberties"."

"Frank, Mr. Justice Black, "The Man and His Opinions," (Knopf 1949), p. 249; *Bridges v. California*, 314 U.S. 252 (1941). Perhaps the people's concept of the whole field of rights prescribed by the first ten and the fourteenth amendments tends to exaggeration. In Samuel Butler's words they (the people) would be equally horrified to hear (them)—doubted or to see (them) practiced," quoted by Mr. Yale Kamisar, 78 Harvard Law Rev., p. 490.

"*Grosjean v. American Press Co.*, 297 U.S. 233, 243.

"*The Tribune Review Pub. Co. v. Thomas*, (3rd Cir.) 254 F.2d 883, affirming 153 F.Supp. 486; *United States v. Kleinman*, 107 F.Supp. 407 (1952); *United Press Ass'n v. Valente*, Judge, 308 N.Y. 1, affirming 120 N.Y.S. 174, and 120 N.Y.S. 642; *Atlanta Newspapers, Inc. v. Grimes*, 216 Ga. 74, 114 S.E.2d 421 (1960), certiorari denied, 364 U.S. 290, despite petitioner's claim that severe curtailment of the press and a substantial blackout of news-gathering would result; and *Ex parte Sturm*, 152 Md. 112, 136 Atl. 312, (1927); Jones, *Congress and Television, A Dissenting Opinion*, 37 A.B.A. Jour., 392 (1951).

"Judge Allen (Second Cir.), *Fair Trial and Free Press*, 19 F.R.D. 15, at p. 37. There is nothing in Milton's Defense of the English People, nor in Judge Allen's splendid article, which may be construed as placing the liberty to "know" and

These dangers to fair trial, which the news media seem to apprehend in enforcement of the standards of Canon 35, seem unrealistic. We have been told by the press that crime in state offenses has been on the increase;² particularly has this been claimed by the Attorney General of Texas at his recent State Conference on Crime, where the opinions of this Court (i.e. *Stanford v. Texas*, No. 40, decided January 18, 1965, 33 L.W. 4140, pending on State's Petition for Rehearing) were awarded substantial blame. But this has not been the experience in the federal courts, where Canon 35 is enforced absolutely by Criminal Rule 53.³

to "speak" above the right to "life", and to "liberty" itself. At page 42 Judge Allen said: "Television is not merely communication. It is a communication plus vivid photography plus the theatre. Freedom of the Press was never intended to give such multiple distraction entree to a court. Televising trials destroys the right of privacy for all considered, for defendants, litigants, and witnesses." The rustication of counsel's classical education has indicated little possibility of edification in reexamining Milton's Treatise in the original, which as we remember was written in Latin.

A contrary view to Judge Allen is expressed by Mr. J. R. Wiggins, Managing Editor (1955) of the Washington Post and Times Herald, who said: "It seems to me unreasonable and illogical to suppose that any citizen, in consequence of his being accused of a crime, should thereby acquire the right to close a court and thus deprive citizens not accused of any wrongdoing, of their rights." Mr. Wiggins's argument is certainly "reasonable" and "logical" if indeed criminal courts perform for the purpose of protecting and insuring "rights" "of citizens not accused of wrongdoing", to be educated and entertained.

²"Criminal Justice," 85 Time, January 8, 1965, p. 43, quoting Justice Bell and Musmanno, of the Supreme Court of Pennsylvania speaking at the meeting of the Philadelphia Bar Association, voting a rule of "self-silence" and "no comment."

³"It is noteworthy that federal criminal case filings do not reflect any crime wave." Chief Justice Warren, *Address to The American Law Institute*, May 20, 1964, 35 F.R.D. 181, at p. 184. "It is heartening" the Chief Justice said, "to be able to report that Congress and the Executive Branch, as

No one has ever suggested in any authorities that any practice be accepted, which proscribes the reporting of the evidence as it is introduced before the jury by the state and defendant during the course of a trial. There should be little conflict between news media and attorneys for the accused, if each but exercises some will to recognize that fair trial in criminal prosecutions and freedom of the news media rest under no irreconcilable constitutional "incompatibility".

All citizens are members of the public, and they enjoy rights both as individuals and members of the public. The right of a citizen "not accused of a crime" to attend and know what progresses at the trial is "diluted" and measured by the parallel right of every citizen as a member of the same public. By natural laws it suffers diminution in the common "aggregate" (in the sense used by Jefferson). But the right of an accused to a fair trial is individual, and is personal to him alone, and to the sovereignty which is charging him. The rights of such individual and such sovereignty are not diluted, and suffer no diminution, but stand first among the rights of man to "life" and "liberty" and the right of the sovereignty to secure redress of "public wrongs". Governments are in the nature of "social compacts", that men and women may more fully attain that "life" and "liberty". All other rights have sprung from the "social man's" desire to more fully enjoy that "life" and that "liberty"; rather than

well as the courts, are taking appropriate action to make criminal trials fairer as well as faster." 35 F.R.D. 181, at p. 188, par. 2.

"*State v. Van Duyne*, N. J. Sup. Ct., decided November 16, 1964, opinion summarized 33 L.W. 2259. It will be pointed out *infra* that a resort to Canon 20, of the American Bar Association, alone can offer no solution to the problem.

to be forced to seek protection from a one man who is the strongest.

In *Hudson v. State*, 132 S.E.2d 508 (1963), the Court holds that " 'No freedoms are absolute.' " The freedom of speech and press are not exceptions." That court holds that "if at any time the representatives of the 'press' in any field of activity interfere with the orderly conduct of court procedure, or create distractions interfering therewith, the court has an inherent power to put an immediate stop to such conduct" and that it was the duty of the court to keep the courtroom free of distractions which might tend to hamper the proper conduct of the trial, and to see that the conditions surrounding the trial are not prejudicial to the accused.

In that case (as in our *Estes* case, R. 49, where the media's expert conceded the possibility of the directional microphone picking up what was said at the counsel table) the record showed that the microphone was within five feet of counsel's table, and the appellate court took "cognizance of the fact that the accused and her counsel would be apprehensive" that the microphone would be sensitive enough to pick up even whispered conversations between them. The case is important as being the only one found by counsel which deals directly with the possible interception by the news media of confidences between counsel and accused.

United Press Ass'n v. Valente, 308 N.Y. 71, 123 N.E.

"Counsel for petitioner believe, as held by Goethe in Germany and Coleridge in England, that man *does* bear' allegiance beyond knowledge to those things he accepts without proof as good. In that sense there are *absolutes*. Man has a right to *live*; he has a right to *think*; he has a right to *speak*; he has a right to *labor*; and he has a right to *rest*; and to borrow a phrase made famous by a great Texan, "in that order".

2d 777, and the opinions in the lower courts; *Geise v. United States*, (9th Cir.) 265 F.2d 658, 669; *The Tribune Review Publishing Co. v. Thomas*, (3rd Cir.) 254 F.2d 883, and the opinion in the district court; and *United States v. Kleinman*, (D.C.D.C.) 107 F.Supp. 407; are splendid cases. But Counsel for petitioner do not rest their position upon some of the conclusions intimated in those cases. We believe the right to "know" and to "find out" information regarding a criminal case is part of the first amendment guarantee of "free speech". Otherwise speech would be mere gossip or "title-tattle".

We do not subscribe entirely to what is said by those cases as to the Sixth Amendment guarantee of a "public trial". Concededly the amendment does provide that "the accused shall enjoy the right to—a public trial". But in our opinion a strong case is made by Judge Froessel (New York Court of Appeals) concurred in by Judge Dye, that "the right of the public to attend a criminal trial—stems from the deep roots of the common law".⁶⁶

The wonders of television present a problem to serious students of our criminal jurisprudence. "Our great

⁶⁶Counsel respect the opinions of such eminent authority as Judge Skelley Wright (C.A.D.C.), 50 A.B.A.Jour., 1125-1129; doubts expressed by Judge Alexander Holtzoff (D.C.D.C.); opinions express by Judges Froessel and Dye (Court of Appeal, N.Y.); by Judges Bell and Musmanno (of Pennsylvania) and former Attorney General Brownell, 35 Neb. L. Rev. 1 and such eminent representatives of the news media as Mr. John Charles Daly, 50 A.B.A.Jour., 1037-1042; and Mr. J. R. Wiggins, 19 F.R.D. 25-36. Counsel, themselves, are unwilling to ignore the extent to which *Grosjean v. American Express Co.*, 297 U.S. 233 (1935); and *Re Oliver*, 333 U.S. 257 (1947), bear upon the sanctity of "freedom of speech" and "public trial." See, also, *Recent Cases Notes*, 67 Harvard Law Rev., 334-346; 68 Harvard Law Rev., p. 1406; and *Meyer v. Nebraska*, 262 U.S. 390 (1923).

problem today and for the future is to domesticate scientific knack and technique so that they may operate compatibly with the values and assumptions of a legal order and, at the same time, make their important contributions to our needs.⁷⁹⁷

We believe the value of news broadcast may be exercised by conventional reporting, in the manner followed by the "press", without exposing the courtroom live to the camera, and without distracting from the job at hand; i.e. the determination in a court trial, according to legal standards and safeguards, of the "innocence" or "guilt" of the accused; and if found "guilty", the determination of his punishment. Complete prevention of the opportunity to report a criminal trial would "amount to an infringement of the First Amendment guarantees".⁶⁸

The freedoms guaranteed by the First Amendment are substantially identical. "Congress may make no law", (a) "respecting an establishment of religion, or prohibiting the free exercise thereof"; (b) "or abridging the freedom of speech, or of the press". *No law shall be made. No religion may be established. Freedom of speech, or of the press, may not be abridged.* It sounds simple, but as Alexander Hamilton warned, it has been made complicated.

The matter as to religion was approached in a case which has been a landmark of First Amendment rights.⁶⁹ We learned that a religion could not be "es-

⁷⁹⁷Francis A. Allen, *The Borderland of Criminal Justice*, (U. Chicago Press, 1964). *First Essay Proposition.*

⁶⁸68 Harvard Law Rev. 1393, at p. 1405; citing *Dennis v. United States*, 341 U.S. 494, 542 (1951) (concurring opinion of Justice Frankfurter.)

⁶⁹*Cantwell v. Connecticut*, 316 U.S. 276 (Jehovah Witness case).

tablished", and that the free exercise thereof could not be "prohibited"; but the "exercise" of a religion involved acts, and that acts could be brought into conformity with the demands of a society in order to preserve the enforcement of the protection of those rights.

"Since we are committed to a government of laws and not of men, it is of utmost importance that the administration of justice be absolutely fair and orderly." The Supreme Court "has recognized that the unhindered and untrammelled function of our courts is part of the very foundation of our constitutional democracy."¹⁰ "A State", we are told, "may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence." "Liberty can only be exercised in a system of law which safeguards order." No Justice of this Court disagreed with those statements of Justice Goldberg, speaking for the Court. Mr. Justice Black, dissenting in No. 49, was even more emphatic in his statement of the principle: "The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures."

The use of television in photographing a trial, over the defendants objection, could have no place in such "calmness and solemnity of the courtroom according to legal procedure".

Mr. Justice Clark said, concurring with Justice Black: "The contemporary drive for personal liberty

¹⁰Mr. Justice Goldberg, *Cox v. Louisiana*, (No. 49 October Term), decided January 18, 1965, 33 L.W. 4105, 4106. This Court was there speaking of "right of speech," and "right of petition."

can only be successful when conducted within the framework of due process of law."

The exclusion of the television camera from the courtroom during a trial does not even approach the denial of any First Amendment guarantee, even under its broadest interpretation.

If the media's position is accepted, as to freedom to obtain information, then a trial court could not proceed until television and its score of agents and assistants announced ready. This was true in Tyler; just as in Dallas, Oswald could not be transferred to the county jail until the newspapers were notified, and the cameras,—as well as his assassin,—were ready. Rule 42 of this Court would be an abridgement, because it prevents the representatives of the media from presenting their Briefs in support of their position in this Estes case, without the consent of the petitioner.

By the adoption by the State Judicial Conference of its Canon 32, Illinois became the thirtieth state which legally placed in effect the American Bar Association Canon 35.¹¹ Informed authority furnishes the information that only two states remain where, as a matter of practice, television in court during trials is permitted,—that is in Texas and Colorado.¹² It is thought that no appellate court in Texas or Colorado as a matter of practice permits photographing of its proceeding, except upon exceptional ceremonial occa-

¹¹1964 Annual Report of the Illinois Judicial Conference, (Burdette Smith Co., Chicago, Illinois), pp. 168-170; 48 Jour. of the American Judicature Society, September 1964, p. 80.

¹²Epton, *A Lawyer's Views*, Sooner Magazine, Feb. 1960, p. 17; Report of American Bar Association's Special Committee on Canon 35.

sions.⁷³ It has never been seriously advanced that such almost universal rule has resulted in any abridgement of free speech, or violation of the public's right or desire to avail itself of the opportunities offered by a public trial.

All federal courts under Rule 53 prohibit photography as a matter of uniform law. It is not believed that the further extension of the standards of the Canon and the Rule to the trial courts of the two remaining states can have any but a minimal effect upon "speech", the right to "know", or the right of the public to attend "public trials".

The right to "obtain information", like the First Amendment right to "exercise" ones religion, by its very nature involves acts and conduct which must be subject to some character of control. Reporters, commentators, columnists, editors, and journalists, despite the reference to the newspapers by one of their *own*, heretofore noted, as a "trade", are members of an ancient profession. Certainly no member of any other class contributed more to the liberty our founders won, than the journalist and the lawyer. If it was the voice of a "Henry" who flung the challenge, it was the pen of a "Paine" who applied the spark, of freedom.

Neither the presence of the members of the press, nor of the commentator, who will later broadcast his news, present the psychological barriers to ascertainment of truth, as does the presence of the television and radio transmitter. It is basic in our form of government that a record shall be kept of public proceed-

⁷³If there are any exceptions to this, they have not been called to counsel's attention.

ings." Canon 35 and Rule 53, by prescribing a uniform rule, maintain the balance and fair and equal treatment between the media. Only a news reporting interest which also owned or dominated a television medium could possibly complain of such "fair and equal" treatment.

Many means of obtaining an approach to ideal reporting of criminal trials have been suggested, and apparently there is only one effective alternative,—some very strong action from the Supreme Court. "It appears that the Supreme Court (despite its inclination toward "judicial restraint") is, possibly, "slowly", "moving toward the strong action needed to prevent the (news media) from becoming a powerful instrument of injustice".⁷⁵

Inter-professional codes,⁷⁶ themselves, smack of censorship, because they are adopted without responsible representatives of the public participating. Enforcement rigidly of the A.B.A. Canon 20 has met the vigorous outcry of the media, and even eminent Judges.⁷⁷

⁷⁴"Each House (of the Congress) shall keep a Journal of its Proceedings, and from time to time publish the same, except such Parts as may in their Judgment require Secrecy." *Constitution*, Art. 1, Sec. 5.

⁷⁵Notes and Comments, 16 Okla. Law Rev. 350. Hope of enforcement by elected officials offers but doubtful promise. Two early astute foreign visitors to America have quoted an even shrewder Yankee, Jared Sparks, as commenting upon the American Press, and its responsibility for its excess, to the effect: "If it is against private individuals, these complain, and the papers are sued in the courts; but if it is against public officers, the latter never complain; they would have the right (long before Sullivan and Garrison) but never make use of it." Pierson, *Tocqueville and Beaumont in America*, (Oxford Press, N.Y. 1938), at pp. 399-400.

⁷⁶*Criminal Justice and Ethics Projects*, 10 A.B.A. News, January 15, 1965, at p. 4.

⁷⁷*Gag Rule Pushed by Bar*, The Austin American, January 6, 1965, Editorials attacking Philadelphia Bar Association's so called "guidelines".

Instructions to the jury to disregard the presence of the cameras and microphones and the possible hundreds of thousands of persons who may be listening are considered largely to be a "farce", even an aggravation.⁷⁸ Controlling the camera and news media by contempt, aside from the question of constitutionality,⁷⁹ certainly has the effect of censorship, and factually is difficult to defend; and in America, if not in England, any type of censorship clashes with the concept of our basic freedoms.⁸⁰

The adoption of the standards of Canon 35 for trials seems the most promising method of meeting the hazards of the cameras, television and broadcasting, of any other suggested;⁸¹ and involves no significant abridgement of speech.

⁷⁸The fact that there have been few instances of acquittals under such instructions has indicated that Mark Twain's "little boy" has not yet been able "to stand in the corner and not to think of a white elephant". See, Judge Frank in *Leviton v. United States*, (2d Cir.) 193 F.2d 848, cert. den. 343 U.S. 946. Jurors may disregard cautionary instructions. See, *The Case Against Trial by Newspaper*, 57 Northwestern University Law Rev. 217, at p. 234.

⁷⁹*Bridges v. California*, 314 U.S. 252 (1941).

⁸⁰Sullivan, *Contempts By Publications*, pp. 47-54, 77-86, 98-102.

⁸¹"If the Bar Association of America can state a code of ethics covering publicity of trials, which are (sic) sensible and which do (sic) not violate decent practices of free publication, and if they will discipline the members of their own profession to abide by that code, they will be met more than half way—by the great majority of newspapers." *Editorial, Toledo News-Bee*, January 18, 1936. This challenge was met in the adoption of Canon 35. 20 J. Am. Jud. Soc'y 82, 83 (1936). See also, 57 N.W.U. Law Rev. 217, 237.

CONCLUSION

As has been said, the Supreme Court has not passed upon, nor determined, the extent to which Canon 35 and Rule 53 give "expression to a standard which should govern the conduct of judicial proceedings". This is an important question, to lawyers, judges, our courts, persons accused of crime, and to the news media, in Texas.

But to this defendant it is important because he suffered the humiliation of the media's exposure of his trial over the objections of himself and of his counsel, and he was convicted of an offense, of which he says he is "not guilty". He was entitled to a presumption of innocence until he should be legally and fairly convicted. If he was unfairly treated by the court's permitting television, either in matters before the court alone, or before the jury, then he has been unfairly convicted, and is entitled, still, to the presumption of innocence.

For the Courts, the question present is a new one, and there is no direct controlling authority, and petitioner has had to predicate his Brief upon expressions of informed scholars in the law, and by analogy. Counsel for petitioner make no claim to originality of expression in this Brief, nor even to the form and plan of the argument. Claim is made, only, to an untiring,—and rewarding at least to them,—effort in organizing and presenting from a mass of sources the petitioner's position.

We have had the benefit of aid and counsel of many legal thinkers. In all of the more recent cases cited, we have had the benefit of the briefs of counsel in those cases. We have used all this aid and information free-

ly, and we acknowledge the aid of all, in forming the arguments, and even the wording in places, which this Court will not fail to recognize.

For the reasons stated, this case should be reversed, and this Court should set as a rule of fair procedure, in all criminal trials, the standards as expressed by Judicial Canon 35 of the American Bar Association.

Respectfully submitted,

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APPENDIX

Constitution and Statutes

The Constitution of the United States:

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT [X]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Criminal Procedure:

Rule 53. *Regulation of Conduct in the Court Room*

The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.

Title 17, Chapter 8, Article 1421. Texas Penal Code 1925:

Art. 1421. *Punishment for felony theft*

Theft of property of the value of fifty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years.

**Title 17, Chapter 15, Article 1545. Texas Penal Code
1925:**

Art. 1545. *"Swindling" defined*

"Swindling" is the acquisition of any personal or movable property, money or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device, or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the right of the party justly entitled to the same.

**Title 17, Chapter 16, Article 1550. Texas Penal Code
1925:**

Art. 1550. *Punishment for swindling*

Every person guilty of swindling shall be punished in the same manner as is provided for the punishment of theft, according to the amount of the money or the value of the property or instrument of writing so fraudulently acquired.

Canons of Judicial Ethics. American Bar Association:

Judicial Canon 35. *Improper publicizing of Court proceedings*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and

witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

Canons of Judicial Ethics, Integrated State Bar of Texas:

Judicial Canon 28. *Improper publicizing of Court proceedings*

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

In connection with the control of such coverage the following declaration of principles is adopted:

- (1) There should be no use of flash bulbs or other artificial lighting.

(2) No witness, over his expressed objection, should be photographed, his voice broadcast or be televised.

(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

(4) Any violation of the Courts' Rules shall be punished as a contempt.

(5) Where a judge has refused to allow coverage, or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 256

BILLIE SOL ESTES,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AND THE TEXAS CIVIL LIBERTIES UNION,
AMICI CURIAE**

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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
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Interest of Amici

The American Civil Liberties Union has engaged solely in the defense of the Bill of Rights for more than forty-five years. Much of its energies have been directed towards increasing the standards of fairness in the administration of the criminal law.

Without a fair trial for the accused, the criminal law has no meaning. The American Civil Liberties Union believes that television coverage of trials within the courtroom adversely affects the administration of justice and denies the accused a fair trial and therefor deprives him of due process of law. Our reasons are set forth in this brief.¹

¹ The attorneys for both parties have consented to the filing of this brief. The letters of consent are on file with the Clerk.

Statement of the Case

Petitioner was tried and convicted for swindling under Title 17, Chapter 16 of the Texas Penal Code on a count which charged that, by means of false pretenses and devices and fraudulent representations, petitioner induced one T. J. Watson to deliver an instrument to him valued at more than \$50.00.

From the outset the proceedings were televised live, the trial court overruling petitioner's constitutional objection to television coverage. Following conviction, petitioner appealed to the Texas Court of Criminal Appeals, which affirmed on January 15, 1964, specifically deciding the question of the constitutionality of the television trial. That court subsequently overruled two separate motions for rehearing. This Court granted certiorari on December 7, 1964, limited to the question:

Whether the action of the trial court, over petitioner's continued objection, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas.

ARGUMENT

I.

Live television coverage of petitioner's trial deprived him of a fair hearing and denied him due process of law.

Strict compliance with the basic elements of a fair trial is essential to due process. Indeed, as Mr. Justice Black stated in *In Re Murchison*, 349 U. S. 133, 136 (1955), "our system of law has always endeavored to prevent even the probability of unfairness." (Emphasis added)

This insistence upon a fair trial was reaffirmed in a recent series of cases revealing the Court's deep concern with the inherently prejudicial effects of widespread news publicity on the outcome of a trial. In *Rideau v. Louisiana*, 373 U. S. 723 (1963), the defendant's out of court "confession" had been telecast three times to the community in which he was tried. The Court reversed the conviction without reviewing the voir dire examination of the jurors, holding that "any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." 373 U. S. at 726. *Rideau* thus departed from the approach of the earlier cases of *Stroble v. California*, 343 U. S. 181 (1952) and *Irvin v. Dowd*, 366 U. S. 717 (1961), where the Court carefully examined the record to determine whether the pre-trial newspaper releases had in fact influenced the outcome of the trial, so finding in *Irvin* but not in *Stroble*. In *Rideau* it was properly recognized that prejudice was inherent in the widespread nature of the television publicity.

In this case it is even clearer that a fair trial was out of the question because the extensive live telecasting im-

peded a purposive, solemn search for the truth and injected into petitioner's trial matter not properly before the court. Its effect was far more subtle and insidious than that involved in the earlier cases. For here the publicity was felt at the time of maximum sensitivity, during the trial itself, and was far more pervasive, since not limited to particular prejudicial items.

Moreover, the earlier cases dealt with the significantly different problem of pre-trial publicity *outside* the control of the court. Because such publicity is inevitable (*Irvin v. Dowd, supra* at 722), and cannot be effectively curtailed by the court short of holding the news media in contempt, the efficient administration of justice demands that a petitioner demonstrate with some certainty that the publicity affected the outcome of the trial. But where a court can eliminate this substantial threat to a fair trial simply by barring telecasting of the proceedings, it is unconscionable for a defendant to be exposed to such intensive publicity.

The federal courts have adopted the policy of Canon 35 of the American Bar Association and absolutely barred television from the courtroom (Fed. R. Crim. Proc. 53) and most states have arrived at a similar conclusion. These decisions reflect a mature awareness that a telecast trial cannot be fair. The Court should now apply the due process clause of the Fourteenth Amendment to invalidate all convictions obtained in the inherently prejudicial atmosphere created by television.

A. The presence of television in the courtroom created an atmosphere that made it impossible to conduct a fair trial.

In allowing the proceedings to be televised, the trial judge lost sight of the admonition that "a courtroom is a place for ascertaining the truth in controversies among

men, and has no other legitimate function." Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A. B. A. J. 615 (1962); The record makes clear that the presence of television diverted the participants from their sole function of presenting, weighing and passing upon the evidence pertaining to petitioner's guilt or innocence.

From the very outset it was obvious that the trial was being televised. Indeed, the sole issue before the court the first two days of the hearing, September 24 and 25, was the propriety of television in the courtroom. The proceedings of the first day were televised live and repeated on tape later that evening in lieu of the usual late night movie (R: 58), reaching an estimated one hundred thousand local viewers, as well as a potential network audience in the millions. (R. 45, 89) It is plain that potential jurors and witnesses were exposed to those telecasts and indelibly impressed with the fact of television coverage of the hearing. An inquiry on the voir dire or at the trial as to whether these participants were aware that the proceedings were being telecast would of course have been futile, serving only to emphasize the television coverage. See *Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912, 916 (1950) (dissenting opinion of Frankfurter, J.).

The New York Times described the courtroom on the opening day of trial:

A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four marked cameras were aligned just outside the gates.

A microphone stuck its 12 inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted

Judge Dunagan on his bench. Cables and wires snaked over the floor. (New York Times, September 25, 1962.)

That this was a correct account of conditions, which continued substantially unchanged the following day, is demonstrated by the record. (R. 41, 42, 43, 47, 48, 49) There is plainly nothing to the argument that telecasting techniques are so far perfected that coverage of a trial can go unnoticed.

Both petitioner, who arrived in court the first day of the proceedings (R. 39), and the jurors, who were sworn in the second day (R. 57), were exposed to this chaos in the courtroom. Although conditions were substantially improved when the hearing resumed on October 22 (see, e.g., R. 66-69), the point had already been driven home that the proceedings would be on the air. For the following reasons the net effect was to interfere completely with the sober search for truth that characterizes a fair trial.

1. The trial judge was forced to devote an unduly large portion of his time and attention to keeping the situation within manageable bounds. Accordingly, he announced no less than ten separate rulings on television coverage during the trial. (R. 34-37, 55-56, 57, 61, 73-74, 103-106, 107, 112, 131, 134-135) Many of these determinations were quite extensive, occupying over a full page in the record, and were of considerable difficulty (R. 34-37). The judge's rulings are the best testimonial to the demands imposed on him: no newsmen behind the bar (R. 35), control camera noise (R. 35), no photographing on second floor (R. 36), officers to enforce these orders (R. 36), identifying badges to be carried but not worn (R. 36-37), "working area" off-bounds to television personnel (R. 55-56), remove cameras to booth (R. 61), no flash bulbs or floods, no cameras in ante-room (R. 61), cease sound coverage (R. 131), no

tape of interrogation of jury or taking of testimony (R. 131), no photographing of defendant's attorneys (R. 134-135).

Plagued by the need to control broadcasters, it is obvious that a judge cannot devote adequate attention to the conduct of the trial. As the Chairman of the American Bar Association's Committee on Public Relations has warned, burdening a judge with responsibility for supervising television personnel must make him "a harassed magistrate." Tinkham, *Should Canon 35 Be Amended? A Question of Proper Judicial Administration*, 42 A. B. A. J. 843, 845 (1956).² A fair trial for criminal defendants is simply not possible under such circumstances.

2. Television in the courtroom makes difficult, if not impossible, an effective presentation of evidence. Not only is the paraphernalia in the courtroom bound to divert the witness, but the prospect of a vast audience observing him is likely to heighten his discomfort. These factors convinced one court not to hold in contempt a witness who refused to appear before televised hearings of the Kefauver committee: "The concentration of all these elements seems . . . necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous." *United States v. Kleinman*, 107 F. Supp. 407, 408 (1952).

Some witnesses may be deterred from giving a complete presentation of testimony by the fear of embarrassment by

² Dean Griswold believes that the judge should be denied all discretion to grant permission to televise trials in order to insulate him from the requests of the news media and from political pressures. This risk is especially great in states in which a judge must run for re-election, since coverage of his trials would provide him with much publicity. Griswold, *supra* at 616-17. This does not mean that a judge's rulings at a televised trial must reflect public sentiment; it does indicate that the decision to allow broadcasting coverage may be based on considerations irrelevant to the demands of a fair trial or the needs of a free press.

widespread telecasting of their statements.³ See Pye, *The Lessons of Dallas—Threats to Fair Trial and Free Press*, National Civil Liberties Clearing House, 16th Annual Conference, March 19-20, 1964, p. 11. Others may allow their theatrical flair to come to the fore and "ham it up" for the television viewers. See Griswold, *supra* at 618. The argument often made in support of television coverage of trials that there is no way of determining just what effect the camera will have on a particular witness, see e.g., Wiggins, *Should Canon 35 Be Amended? A Newspaperman Speaks for the News Media*, 42 A. B. A. J. 838, 841, 842 (1956), merely reinforces the need to bar all television from the courtroom.

The television camera may inhibit testimony which offends prevailing public sentiment. Consider, for example, the reluctance of a witness in a case involving an explosive racial issue to testify for the "wrong" side before an entire community of television viewers. Indeed, in the present case a considerable amount of public opinion had already formed that could affect the testimony of a less than courageous witness. For similar reasons, this Court has always been careful to insulate judicial trials from the pressure of public opinion. See *Frank v. Mangum*, 237 U. S. 309 (1915); *Moore v. Dempsey*, 261 U. S. 86 (1923); *Shepherd v. Florida*, 341 U. S. 50 (1951) (concurring opinion).

3. If the defendant takes the stand, the unnecessary added burden of exposure to a television audience will un-

³ It appears from a press release incorporated into the record (R. 10-11) that the trial judge did not permit television coverage of testimony. However, on October 23, the judge proscribed further sound coverage of testimony, suggesting that until that time there had been telecasting of witnesses. While some of the dangers involved at a televised trial may be mitigated by a rule forbidding the televising of witnesses, the mere fact of the trial being covered probably will still have a substantial effect on individuals giving testimony.

doubtedly affect his testimony adversely. Even if he does not take the stand, he is in constant view of the jurors, who may take his discomfort for an indication of guilt rather than the result of inordinate publicity upon him. The predicament has been well stated:

"The agitation of the accused is keen enough without imposing upon him the additional burden of a psychological torture not unlike the third degree. It is unjust to demand of an accused standing trial that he respond and be expected to be judged on his response when his composure is so taxed and he is unable to appear to the best of his ability. (Yesawich, *Televising and Broadcasting Trials*, 37 *Corn. L. Q.* 701, 709, 710 (1952).)

It is essential to the fair conduct of a trial that the participants approach their tasks with an appreciation of the serious and important nature of the hearing. The dignity and austerity of the courtroom and the solemnity of the proceedings should drive this home to them. In a "circus atmosphere" this is impossible.

During the trial petitioner's attorney protested to the judge that

this courtroom doesn't look like a courtroom to me; it looks like a moving picture theater . . . and this trial has assumed to me a character of proceedings to entertain and instruct the public. . . . The cameras . . . shine out of the booth just as cameras do at a moving picture show . . . It is like the defendants of Perry Mason's. (R. 65)

Canon 35, Canons of Judicial Ethics of the American Bar Association, is especially concerned with this aspect of tele-

vision coverage: "Proceedings in court should be conducted with fitting dignity and decorum. . . . [B]roadcasting or televising of court proceedings detract from the essential dignity of the proceedings" Mr. Justice Douglas has been a severe critic of televised trials from this perspective: "The trial is as much of a spectacle as if it were held in the Yankee Stadium or the Roman Coliseum. When televised, it is held in every home across the land. No civilization has ever witnessed such a spectacle." Douglas, *The Public Trial and the Free Press*, 33 Rocky Mt. L. Rev. 1, 5 (1960).

This loss of dignity may not only affect the outcome of the trial; it also goes against "deep rooted feelings" expressed by this Court that elementary standards of decency and civilization must attend all criminal proceedings. See *Jackson v. Denno*, 378 U. S. 369, 385, 386 (1964); *Spano v. New York*, 360 U. S. 315, 320, 321 (1959); *Rochin v. California*, 342 U. S. 165, 172, 173 (1952).

During the trial, the court-designated representative of the television stations asked, when being examined by petitioner's attorney, "Is television on trial here?" (R. 92) In a sense it was, for as Mr. Justice Douglas has observed, televising a trial

. . . is not dangerous because it is new. It is dangerous because of the insidious influences which it puts to work in the administration of justice The presence and participation of a vast unseen audience creates a strained and tense atmosphere that will not be conducive to the quiet search for truth. (Douglas, *The Public Trial and the Free Press*, *supra*.)

Petitioner's trial demonstrates that those influences are so great as to amount to a denial of due process.

B. Television coverage of the trial denied petitioner due process of law because the jury could not render a verdict based solely upon the evidence introduced at the trial.

Mr. Justice Holmes stated that "the theory of our [judicial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U. S. 454, 462 (1907). See also *Irvin v. Dowd*, 366 U. S. 717, 722 (1961). This admonition becomes meaningless when a trial is allowed to be televised.

Convictions in federal trials have been reversed when ineffective steps were taken by the trial judge to insulate the trial from outside influences. *United States v. Accardo*, 298 F. 2d 133 (7th Cir. 1962); *Coppedge v. United States*, 272 F. 2d 504 (D. C. Cir. 1959). The mere fact that Estes' jurors were instructed to disregard newspaper and television comments on the case (R. 107, 130-131) was also ineffective in light of the overwhelming likelihood of extraneous information reaching jurors through television. The cameras should have been barred in recognition of Justice Jackson's observation that "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . [is known by] all practicing lawyers . . . to be unmitigated fiction." *Krulewitch v. United States*, 336 U. S. 440, 453 (1949).

It is difficult to believe that all jurors will not turn on their television sets when they return home from the trial, in spite of the judge's instruction, if only to see how they appeared on the screen. Since the telecast will be edited to fit a limited time period (see R. 72, for an indication of how the film clips were used in this case), it is likely that the portions of the trial replayed will be those of the greatest audience interest. This distortion of the evidence, based

on commercial considerations, serves to emphasize in the juror's mind selected portions of the case, and the impact of the television evidence accordingly will be greater than that of testimony observed at the trial. This danger of distortion cannot be risked if the defendant is to have a fair trial. See Mr. Justice Frankfurter's dissent in *Stroble v. California*, *supra* at 201.

Further, evidence may be ruled inadmissible at the trial without any assurance that the television director will follow the judge's order to "disregard the testimony." Similarly, there is no guarantee that bench conferences, supposedly outside the jury's hearing, will not reach the juror at his home. Again, preliminary examinations held on an issue such as the voluntariness of a confession may be witnessed improperly by the jurors via television.

In order to prevent such situations, a judge could perhaps exercise control over television content but this would saddle him with one more distraction from the main job of conducting the trial. There is no feasible way (short of locking up the jury, which is impractical in a trial of any length) of insuring that the jurors will not watch television, nor is it likely that a juror would admit that he violated the judge's admonition. See *United States v. Accardo*, *supra* at 136; *Pye*, *supra* at 4. Yet the receipt of evidence by a juror via television has constituted grounds for reversal. *Rideau v. Louisiana*, 373 U. S. 723 (1963).

Because television coverage generates added interest in a trial and identifies the participants, members of the jury may be approached by friends and strangers who want to volunteer evidence or just talk the issues over. It has been recognized, however, in federal trials at least, that receipt of otherwise inadmissible extraneous evidence from third persons can result in a mistrial. *Coppedge v. United States*, 272 F. 2d 504, 508 (D. C. Cir. 1959).

Television in the courtroom, unlike the press, is not a normal occurrence, and never will be except in cases of great public interest. When it is there, that fact is plain to the jurors. This raises the danger that some jurors will look upon the trial as unusual and consequently believe that a particular verdict is expected of them. Moreover, as in the present case, the decision to televise the trial is often based upon the notoriety of the defendant, thus focusing upon the defendant's overall character and history, matters not properly before the jury.

If a prevailing community attitude, fanned by television publicity, is sensed by the jurors, they may be reluctant to hand down a verdict contrary to public opinion. A juror need only recall the nation-wide television coverage of the polling of the jurors in the Jack Ruby trial to be deterred from rendering what he believes to be a just verdict. See Douglas, *supra* at 9.

Questioning individual jurors as to whether they have been influenced by public opinion would not necessarily prevent this evil. First, a juror might be reluctant, in the face of strong public sentiment, to be the cause of a mistrial by such a declaration. Second, it is not at all clear that the juror is consciously aware of the pressures that bear upon his verdict:

One cannot assume that the average juror is so endowed with a sense of attachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity. (*Delaney v. United States*, 199 F. 2d 107, 112-113 (1st Cir. 1952) (Magruder, C.J.).)

Only by excluding television coverage entirely can the judge guard against the influence of public opinion upon the outcome of the trial and the danger that the jury will rule on an improper basis. As Mr. Justice Frankfurter warned, "such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury." *Irvin v. Dowd*, 366 U. S. 717, 730 (1961) (concurring opinion).

C. Television coverage of the trial denied petitioner the right to effective counsel.

In order to protect their client's right to be free from the interference of the television camera, petitioner's attorneys were forced to divert their attention from the merits of the case. They made eight separate and often elaborate motions to eliminate or limit television coverage. (R. 31-34, 53-56, 61-62, 103, 107, 131, 132-133, 134)

Early in the trial Estes' attorney protested to the judge that "motion pictures and the grinding of cameras while I am interrogating or cross-examining witnesses makes it almost impossible for me to give my attention to the case and to properly represent my client." (R. 32) A television technician admitted on examination that one of the cameras was positioned so that an accurate picture could be taken of all papers and documents on the counsel table, as well as of the actions of defendant and his attorney. (R. 44) The possibility of a microphone picking up conferences at the table was also conceded. (R. 49) Further objections were raised by petitioner's attorney (R. 62, 66), and the judge did accede to a request that there be no coverage during defendant's summation. (R. 134) He also indicated that he would correct the situation if it appeared that the attorneys' conversations were being picked up. (R. 49, 50)

In spite of the judge's attempt at corrective measures, the petitioner's attorney was faced with a moral dilemma in conducting the trial:

To me it is highly distasteful to be forced to defend a man in a criminal case where cameras are trained on me during the trial or any part of the trial. I believe sincerely in Canon 35 of the American Bar Association which prohibits photography or cameras in the court room. (R. 64)

A defendant's right to counsel is not satisfied "by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Powell v. Alabama*, 287 U. S. 45, 71 (1932). Although *Powell* and the line of cases culminating in *Gideon v. Wainwright*, 372 U. S. 335 (1963), dealt primarily with the question of assigned counsel, the rationale of *Powell* applies in a situation in which the aid of retained counsel is rendered ineffective by an action of the state. The record in the present case establishes that the presence of television in the courtroom made it impossible for petitioner's attorneys to provide him with effective assistance.

Telecasting not only hinders attorneys in the conduct of the case, but raises serious possibilities of unethical conduct. As a leading commentator has pointed out (Pye, *supra* at 11):

The bar has always been regarded as the nursery of political careers. The temptation offered to the elected prosecutor by television coverage is a great one . . . [H]is conduct in the televised trial may be dictated by what the public thinks he should do rather than what he knows is proper. The defense counsel who appreciates that the interests of his client require that he lay back and avoid forensics may be affected by the fact

that television viewers who do not understand his strategy may never seek his services.

In the face of these obstacles to effective representation, it is difficult to see how televised trials comport with the demands of due process.

D. Television coverage is unfair because it precludes the possibility of a meaningful new trial.

A vast television audience witnessed the trial of Billie Sol Estes. If this Court vacates the judgment below and remands for a new trial it will be extremely difficult, if not impossible, to select a jury that has not prejudged the outcome by watching the first trial. In *Rideau v. Louisiana*, 373 U. S. 723 (1963), petitioner's confession was telecast in the local area. Without reviewing the voir dire examination of the jurors, the court held that due process required a trial before a jury "drawn from a community of people who had not seen and heard Rideau's televised 'interview'." 373 U. S. at 727.

Because of the possibility of reversible error or mistrial, every televised case raises the spectre of *Rideau* upon commencement of a second trial. *Rideau* arose on a denial of a motion for a change of venue, leaving open the possibility of a new trial in an area unsaturated by television. But in the present case, and in most "all out publicity" cases, it may be impossible to find a community in which the trial had not been telecast. This point is most dramatically illustrated by the televised shooting of Lee Harvey Oswald and the subsequent trial of Jack Ruby. The practical, and intolerable, result would be that a new trial would have to be held in spite of the exposure condemned in *Rideau* as violative of due process. See the opinions of Mr. Justice Frankfurter, concurring in *Irvin v. Dowd*,

supra at 729, and dissenting from the denial of certiorari in *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 915, 916.

Extensive television exposure of those suspected of crime has been widely condemned. E.g., *Television and the Accused*, A Report of the Committee on Civil Rights, New York County Lawyers Association; Letter from Seven Harvard Law School Professors to the Editor of the New York Times, Dec. 1, 1963, Sec. 4, p. 10, col. 8. The publicity discussed in those articles was beyond the corrective power of the court. See *Wood v. Georgia*, 370 U. S. 375 (1962). When it is within the power of a court to prevent another *Rideau* case, a failure to do so seems inexcusable. A defendant's right to appeal a conviction should not be vitiated by making the possible grant of a new trial a hollow victory. Cf. *Green v. United States*, 355 U. S. 184 (1957).

E. *Exclusion of television from the courtroom does not conflict with other constitutionally protected interests.*

Neither the freedom of communication assured by the First Amendment nor the right to a public trial guaranteed by the Sixth Amendment, offers any protection to televised trials. First, this Court "has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press." *Irvin v. Dowd*, 366 U. S. 717, 729 (1961) (concurring opinion). Second, the right to a public trial is not infringed by the mere exclusion of technical equipment from the courtroom; the general public, including press and television personnel, is free to attend. This is all that the Sixth Amendment requires. See Radin, *The Right to a Public Trial*, 4 Temp. L. Q. 381, 391 (1932); 1 Cooley's Constitutional Limitations, p. 647 (8th ed. 1927).

It has been argued, however, that a decision to bar television from the courtroom will curtail freedom of com-

munication because television educates the public and guards against abuses of the judicial process. See, e.g., Monroe, Remarks, Conference of the National Civil Liberties Clearing House, Washington, D.C., March 20, 1964. Wiggins, *supra* at 839. But the press serves both these purposes and does so without the impediments to a fair trial necessarily associated with live telecasts.

Most abuses of the judicial process, such as illegal searches, coerced confession and deprivation of counsel take place before trial, and television coverage would have no effect on them. At the trial itself, the court, counsel and the press insure a fair hearing to both sides. The presence of television personnel and a home audience could hardly provide further safeguards; indeed, only those trials which are heavily attended and carefully observed would receive television publicity.

Press coverage, it should be pointed out, presents none of the threats of televised trials. The physical presence of newsmen cannot affect the course of the proceedings, as must a battery of television equipment. Nor does a newspaper have the deep psychological effect that television has on a juror who sees a telecast afterwards. See *Television and the Accused*, A Report of the Committee on Civil Rights, New York County Lawyers Association, p. 3. The abuses of press coverage generally arise before the trial and can be corrected by inquiry on the voir dire, a change of venue, or a postponement of the trial. The effects are not as severe since, unlike the telecast, their impact is not felt during the trial at the point of greatest sensitivity. And, since press coverage is generally not as pervasive as a network telecast, there is not nearly the same risk that it will taint a new trial if one should become necessary.

II.

In permitting television coverage of the petitioner's trial the trial court deprived him of the equal protection of the laws.

Although television is a news medium, commercial necessities dictate that only the rare case will receive the extensive coverage given petitioner. In fact, most cases would probably not be televised at all. See *Tinkham, supra* at 884, 885. Telecasts require sponsors, and sponsors want only those presentations which generate the greatest public interest. The Estes trial, carried live the first day of the proceedings and later that evening, had at least fifteen different sponsors (R. 84-88)—the sponsors for the normally scheduled program for the particular time. It is unlikely they would consent to the substitution of a program of lesser interest.

This fact of commercial life introduces an invidious distinction between those defendants who may or may not be subjected to the abusive practices discussed in Part I of this brief. Since those pressures may actually determine the outcome of the trial, a defendant's fate turns on the accident of his being a public figure or becoming involved in a cause célèbre. When the quality of justice turns on such an irrelevant distinction, state participation in the wrong denies the defendant equal protection of the laws.

It has been held that "when the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Singer v. Oklahoma*, 316 U. S. 535, 541 (1942). The need for equal justice was affirmed in *Griffin v. Illinois*, 351 U. S. 12, 16 (1956), for "weak and

powerful alike." The same reasoning should apply when the famous or infamous are singled out for spectacular and prejudicial treatment by the television industry and the practice is condoned by the trial court.

CONCLUSION

For the reasons stated above, the judgment should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 256

BILLIE SOL ESTES,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

**On Writ of Certiorari to the Court of
Criminal Appeals of Texas**

**BRIEF OF THE STATE BAR OF TEXAS
AS AMICUS CURIAE**

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BRIEF OF THE STATE BAR OF TEXAS AS AMICUS CURIAE

Letters from attorneys for both parties consenting to the filing of this brief are on file with the Clerk.

Question Presented

Is the judge in a state criminal trial required by the due process and equal protection clauses of the Fourteenth Amendment to order the total exclusion of live television coverage from any and all portions of the trial upon objection by the defendant?

Interest of the State Bar of Texas as Amicus Curiae

The Judicial Section of the State Bar of Texas is composed of the judges of the county courts at law

and the district and appellate courts of Texas. Among the Canons of Judicial Ethics approved by the Judicial Section on September 27, 1963, is Canon 28, which permits the trial judge in his discretion to allow live television coverage of portions of a trial subject to certain limitations. These Canons, which had been under study since 1956, are advisory only, and do not have the status of rules of court. They do, however, express the opinion of the Judicial Section as to desirable ethical standards for judges.

The position has been taken by petitioner and by the American Bar Association in its *amicus curiae* brief that the due process and equal protection clauses of the Fourteenth Amendment assure to an accused in a state criminal trial the absolute right to require the exclusion of live television coverage from any portion of his trial. The (American Bar) Association further takes the position in effect that this right to exclude live television is of the same dignity as such specific Sixth Amendment guarantees as the right to an impartial judge and jury, the right of confrontation, and the right to counsel, and that therefore specific prejudice resulting from television coverage need not be shown. This position is of course incompatible with an expressed policy of the Judicial Section of the State Bar.

The Association's brief is laced with statements describing possible results of televised trials and assertions to the effect that "the trial was televised." The State Bar fears the cumulative effect of these statements is to induce the impression that the trial was televised to a far greater extent than was so. The Association's brief devotes considerable space to the disturbing effects of live television on witnesses and counsel both on direct and on cross-examination. This con-

tention is rendered less persuasive when it is realized that there *was no* live television during the taking of any testimony on the merits at petitioner's trial.

The Association has long been a distinguished leader of the bar with a genuine interest in the improvement of the administration of justice in this country. This leadership and interest have been demonstrated often and effectively by action as well as affirmation. The prestige of the Association lends great weight to efforts supporting worthy reforms and objectives. Conversely, when that prestige supports an erroneous position, the possibility of harm is greater. Since the State Bar is convinced of the error of the Association's position, we feel constrained to present an opposing view to demonstrate what we conceive to be the error in its analysis. We express no opinion as to petitioner's guilt or innocence.

Statement

The State Bar accepts the statements that appear in the briefs of petitioner and the Association except as they conflict with the following designation of the only four portions of the trial which were actually telecast on live television:

1. A hearing on petitioner's motion to prohibit telecasting and for a continuance held on September 24 and 25, 1962 (R. 18, 82). The *only* testimony offered during this hearing was in support of the motion to prohibit telecasting (R. 19). The motion for continuance was granted, and the trial reset for October 22, 1962 (R. 19).
2. The opening argument for the State (R. 20, 25).
3. The closing argument for the State (R. 17, 25, 134).

4. The return of the verdict by the jury and its acceptance by the Court (R. 20).

During the voir dire examination of the jury and the taking of testimony no live television or radio broadcasting was permitted, but the television cameras were permitted to make film or tapes *without sound* (R. 19, 20, 25, 108, 131). During this period the television cameras were operated only at intervals, and the film or tapes were used for the purpose of providing silent background film for regular television newscasts (R. 19, 20, 131).

Summary of Argument

The question of live television trial coverage is relevant to the demands of due process to the extent that it interferes with the constitutional rights of an accused. However, an accused has no constitutional right to require the total exclusion of live television coverage from his trial. Experience indicates that controlled live television coverage is consonant with the requirements of the due process and equal protection clauses. Whether an accused is denied due process and the equal protection of the laws by controlled and limited live television coverage of his trial is a question of fact. The constitution should not be read as restricting the right of the public to acquire knowledge unless that restriction is demonstrably necessary.

ARGUMENT

I

The history of Canon 35 does not reflect that an accused has the constitutional right to exclude live television coverage from all portions of his trial.

Beginning on Page 3 of its brief the Association

attempts to trace "the development of (its) position that the Canon (35) embodies the constitutional principle here involved." The State Bar recognizes that the Fifth, Sixth, and Fourteenth Amendments guarantee to an accused the right to a fair and impartial jury and judge, the right of confrontation, and the right to counsel. The State Bar shares the Association's concern that no accused be denied these basic rights. However, the Association claims that Canon 35 embodies a new concept of constitutional dimensions; that is, that the Fifth, Sixth, and Fourteenth Amendments guarantee to an accused in a state criminal trial that no portion of his trial shall be televised over his objection. The State Bar does not agree that this is a right of constitutional dimensions and does not feel that the asserted development of this position is demonstrated in the brief or elsewhere.

At least twenty articles bearing on the merits of Canon 35 have appeared in the American Bar Association Journal during the past ten years. Some have been favorable to Canon 35 and some unfavorable. Many of these articles have been written by authorities well qualified to speak on constitutional matters; for example, Justice William O. Douglas, judges of the United States Courts of Appeal and District Courts, Dean Erwin Griswold of Harvard Law School, and eminent practicing lawyers. In none of these articles has the position been taken that the defendant's right to exclude live television coverage of his criminal trial is itself a right of constitutional dimensions. If this were a constitutionally protected right, would that not be the strongest single argument in favor of the Canon 35 approach? Would not the proponents of Canon 35 have made this point before discussing its merits as merely the most appropriate among legitimate alternative approaches? Conversely, if any op-

ponent of Canon 35 had knowledge of such an argument, would that not be the first point he would dispute? If he fails to overcome that argument he fails in all, since there would be no lawful alternative to the approach of Canon 35. The very pages of the Association's own Journal fail to reveal the development of its position.

The preamble to the Association's Canon of Judicial Ethics* reveals no purpose other than to declare desirable ethical standards for judges in their personal practice. This is a laudable purpose, but it indicates no intention to express constitutional imperatives.

II

Analysis of Canon 35 indicates that the asserted right of an accused to require total exclusion of live television coverage from his criminal trial is not a right of constitutional dimensions, but is merely one approach to the objective of a fair trial.

To understand fully the position of the Association it is helpful to analyze the constitutional principles which Canon 35 assertedly embodies and Canon 28 assertedly abridges. These principles are discussed in the Association's brief, and relate generally to the right of an accused to have a fair trial. Specifically,

***Preamble, Canons of Judicial Ethics of the American Bar Association:**

In addition to the Canons for Professional Conduct of Lawyers which it has formulated and adopted, the American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

the relevant constitutional principles concern the right to an impartial judge and jury, the right to counsel, and the right of confrontation.

The conduct of a criminal trial involves many procedures and interests which must be resolved so as to secure these rights to an accused. There are many different approaches to the resolution of these problems. There are at least two approaches to the problem of securing these essential rights to an accused *vis a vis* live television coverage of his trial. One approach is to eliminate all live television as contemplated by Canon 35. Another approach is to permit live television under limited and controlled conditions. The Association has confused the *approach* with the *principle* which is sought to be preserved. Total elimination of live television coverage is an approach which assures that an accused will not be deprived of his constitutional rights by reason of live television coverage. This states the obvious. However, it is quite a different thing to say that this approach is the constitutional right.

The State Bar sees no need to discuss the difficult problems of balancing or "federalism" (see petitioner's brief, pp. 23 & 24); that question involves the extent to which constitutional protections imposed against federal action should be imposed against state action. The State Bar's position is that a defendant has no right of constitutional dimensions, even on the federal level, to demand the total exclusion of live television coverage from all portions of his criminal trial.

In *Roth v. United States*, 354 U.S. 476, 505 (1957), Justice Harlan wrote that each of the states of the Union may be viewed as an experimental laboratory in which various solutions to various problems are undertaken. This comment was made in a case in which

the balancing problem was in issue and where there was an unquestioned federal right at stake; i.e., freedom of expression. The comment has a *fortiori* application where no such right is at stake.

This characterization as an "experimental laboratory" appropriately describes the position of Texas and Colorado, two states which permit live television coverage of criminal trials under controlled conditions. The experience in these states may be of great assistance in demonstrating the compatibility *vel non* of live television techniques with the constitutional requirements inherent in the concept of due process. Yet how can these experiences be meaningful unless actual results are examined? If experience shows there exists the probability that live television has such an insidious effect on the judicial process that even partially televised trials will result in a denial of due process, then there will be a rational and demonstrable basis for the claim that due process requires the total exclusion of live television cameras from the courtroom.

It was stated in *Roth, supra*, that:

"Above all stands the realization that we deal here with an area where knowledge is small, data are insufficient, and experts are divided." 354 U.S. at 502.

If this statement is true of a problem as old as obscenity, then how much truer it is of a development as new as television. Our knowledge of the bearing which controlled live television coverage might have on criminal trials is limited. The Association's brief contains an exhaustive recital of results, all disagreeable and some unconstitutional, which might occur if a trial were televised in its entirety, and if the participants and witnesses were susceptible to abnormal behavior patterns triggered by mere awareness of the television

cameras. However, no nexus has been shown to exist between what appears to be the Association's classic conception of a televised trial and the proceedings which actually occurred at petitioner's trial.

We respect the Association's position insofar as it expresses a preference for the approach taken by Canon 35 over that taken by Canon 28. However, the Judicial Section of the State Bar is aware of the guarantees of a fair trial inherent in the Fifth, Sixth, and Fourteenth Amendments. The approach reflected by Canon 28 is an attempt to assure the observance of these guarantees. That this approach is at variance with that reflected by Canon 35 is little reason to say that the constitutional principles "embodied" in it are also different.

The exercise of the Court's supervisory powers in the promulgation of Rule 53 of the Federal Rules of Criminal Procedure does not elevate the approach taken by Canon 35 to the level of an independent constitutional guarantee.

The State Bar does not claim prescience as to the ultimate resolution of the problem of televised trials. The State Bar's position is only that the approach of Canon 28 is an appropriate one, particularly in view of the paucity of current empirical knowledge about the problem. Experience may or may not indicate that a different approach should be taken. However, the rather polemical brief filed by the Association is not persuasive that the proceedings in petitioner's trial so indicate. It is a simple matter to imagine what may happen when a trial is televised; this is appropriately done in legal periodicals. In a case appearing before this Court, however, it is reasonable to expect that some connection be made between the imagined and the actual results.

III

The mere fact that portions of a criminal trial are televised is not itself a denial of due process.

It is stated in the Association's brief in a footnote on Page 21 that:

"... petitioner is entitled to a new trial without having to show specific prejudice. For example, denial of the right to counsel justifies a reversal and a new trial without any inquiry into whether the presence of counsel would have resulted in acquittal. . . . Similarly with the right of confrontation, a defendant need not show that had he been allowed to cross-examine, the witness would have departed from his original testimony. . . ."

This quotation, while true enough as far as it goes, reveals the error in the Association's analysis. Specific prejudice resulting from the denial of these basic rights need not be shown, but there must be a showing of a denial of the right itself. An accused certainly has the right to object to live television coverage of any portion of his criminal trial. But the Association says that this right is of the same dignity and dimension as such specific Sixth Amendment guarantees as his right to counsel and his right of confrontation, and that, therefore, specific prejudice need not be shown. This reads into the Constitution a meaning not warranted by the present state of our knowledge of the effects of live television coverage on criminal trials.

The rights guaranteed to individuals by the due process clause of the Fourteenth Amendment are mature, deliberate, and appropriate responses to felt needs. The mere fact that live television coverage of a criminal trial may result in the denial of a fair trial does not require its total exclusion as a matter of constitutional right. The confession of an accused may be

coerced; the practice of admitting it in evidence carries with it that very real danger. Yet confessions are regularly admitted notwithstanding the difficulty facing the accused in establishing that it may have been coerced.

The fact that gray areas exist is no reason to eliminate every factor which may contribute to them. An accused has certain rights specified in the Sixth Amendment, just as he has protection against the introduction in evidence of a coerced confession in the Fifth and Fourteenth Amendments. However, it does not follow that an activity which under *some* circumstances may impinge on those rights should under *all* circumstances be eliminated.

IV

Analysis shows that the terms of Canon 35 have no bearing on petitioner's trial except in matters of court decorum and dignity.

An analysis of the specific provisions of Canon 35 as applied to the proceedings in petitioner's trial reveals another difficulty in the Association's position that the approach of Canon 35 is a constitutional imperative. Three factors are recited in Canon 35 as requiring the blanket strictures imposed on live television trial coverage:

1. It detracts from the essential dignity of the proceedings.
2. It distracts participants and witnesses in giving testimony.
3. It creates misconceptions with respect thereto in the mind of the public.

In petitioner's trial neither participants nor witnesses were on live television during the taking of testimony.

Therefore, it can neither be said that they were distracted by it during this critical period nor that misconceptions with respect to the testimony were created in the mind of the public. The only factors relevant to petitioner's trial are that the limited live television coverage may have detracted from the essential dignity of the court and may have created misconceptions in the mind of the public with respect to the proceedings televised. It cannot be doubted that the dignity of the proceedings is a serious and important aspect of judicial administration. But surely it stretches the point to say that a practice which *may* in some degree detract from that dignity is a violation of petitioner's constitutional rights even without a showing of specific prejudice.

We strongly resist the contention that the limited live television coverage present in his trial was *per se* a violation of any right guaranteed to him by the Fifth, Sixth, or Fourteenth Amendments.

V

Actual experience does not support the constitutional argument made by the American Bar Association.

Much of the criticism directed toward live television trial coverage comes from those who have had little or no actual experience with it. Often the information available to them is incomplete and misleading. Such reports as the one quoted in the Association's brief, p. A-9, attributed to the *New York Times*, stating that "a microphone stuck its 12-inch snout inside the jury box," offer little basis for meaningful opinions.

Those of little actual experience with this problem are rightly heard. Full debate is desirable. However, this is not an area where *a priori* knowledge is entitled

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to more respect than that supported by experience. Yet it is implicit in the attitudes of many who support Canon 35 that those who oppose it do so because of preconceived notions, because of pressure from vested interests, or just because of the inclination to defend any position once taken. The position of the State Bar is simply that actual experience does not support the constitutional argument made by the Association. If this position is incorrect, then it should be possible to point out how experience does support the constitutional argument made by the Association. The State Bar would welcome, but has not yet seen, such an analysis.

In December of 1955 a murder trial held in Waco, Texas, was televised in its entirety. The American Bar Association asked Abner V. McCall, then President of the local bar association and Dean of the Baylor University Law School, to audit the trial and prepare a report of the proceedings. This report was prepared by a committee of the Waco-McLennan County Bar Association under Dean McCall's direction, and was published in the February 1956 issue of the *Texas Bar Journal*. The report, unusual in that it is a full and objective appraisal of a televised trial, should be of interest to the Court; for this reason it is attached as an appendix to this brief. The report included post-trial interviews with the participants and witnesses. They expressed no objection to the television coverage. The Association's constitutional argument is not supported.

The record in petitioner's own case is another concrete example that controlled live television coverage of a trial is consonant with due process requirements. None of the testimony on the merits was televised. It was stated by the Court and defense counsel that the televised pretrial motions revealed no facts or evidence

bearing on the merits (R. 19, 63). The jurors were not permitted to separate. It is clear that they did not spend their evenings watching themselves on television, being exposed to repetitions of the most exciting testimony, being accosted by strangers, listening in on bench conferences, or hearing inadmissible evidence (see Association brief 12, 13; A.C.L.U. brief 11, 12).

The arguments and speculations about what *might* happen in a televised trial are met convincingly by what *did* happen in petitioner's trial.

VI.

The mere fact that portions of a criminal trial are televised is not itself a denial of the equal protection of the laws.

On Page 21 of the Association's brief it is stated that:

"Since the presence of television in the courtroom has the inevitable effect of invading petitioner's basic trial rights, . . . any rule or practice which gives the trial judge discretion to permit the televising of judicial proceedings will automatically deny the petitioner the 'equal protection of the laws'."

In making this statement the Association presupposes that the presence of live television is *per se* a denial of due process. Thus the Association is saying only that one who has been denied due process has also been denied the equal protection of the laws. We concede this; we do not concede the validity of the presupposition on which the statement is based.

The State Bar's position is that controlled and limited live television is consonant with the requirements of due process. Thus viewed, the granting of media

requests for live television of a trial under limited and controlled conditions is not a denial of the equal protection of the law.

The Association also says on Page 21 of its brief that:

"The practical effect of such discretion is that the judge will be confronted with media requests only in those cases involving the famous or the infamous; the deleterious effects of television will be visited on them alone."

This overlooks the fact that when operated under limited and controlled conditions live television is little different from the other mass communication media, all of which contribute to the mass of publicity directed toward a defendant. The whole purpose of controlling and limiting the operation of live television is to eliminate the problems which might result from its untrammelled operation. Under these controlled conditions the statement quoted above says little more than that the famous or infamous are most damaged by publicity. This is so by definition.

If the due process clause of the Fourteenth Amendment gives an accused the absolute right to require the total exclusion of live television coverage from all phases of his criminal trial, then to permit any live television coverage over his objection denies him the equal protection of the laws. Similarly, if an accused does not actually receive a fair trial because of live television coverage (or for any other reason) he also has been denied the equal protection of the laws. These statements mirror a rather obvious connection between a denial of due process and the consequent denial of equal protection. However, if the Association is attempting to rely on the equal protection clause as requiring the *automatic* reversal of petitioner's conviction

tion, independent of considerations of specific prejudice and due process, then we must take issue.

The Association's brief is not persuasive that the increment added by the presence of controlled and limited live television to the mass of publicity already present in a criminal trial is automatically a denial of the equal protection of the laws. The publicity attendant upon most criminal trials occurs in the pre-trial stages. Certainly it is common knowledge that petitioner was the subject of many newspaper and magazine articles as well as radio and television newscasts in the months before his trial. His name and picture were constantly before the public during this period, and they appeared in all the mass communications media. It is pointed out in the Association's brief (p. 21) that only the trials of the most famous or infamous will be "televised." It is implicit in this statement that the public already has a great deal of information about the accused. It seems unrealistic to say that the spectators, witnesses, and prospective jurors who walked into the Courthouse in Tyler and saw television and camera equipment were suddenly seized with the knowledge that there was widespread public interest in the Estes trial. Television is now a part of the daily life of almost everyone in this country. Portions of other trials in Judge Dunagan's Court have been televised (R. 109). It is a common occurrence not only in Tyler (R. 109) but throughout Texas to see television newscasts which show silent film or tapes of court proceedings while the television newscaster describes the day's happenings. One wonders at the effect on witnesses and jurors of a courtroom full of press reporters diligently, silently, and grimly taking notes during an entire trial. The point we are making is that it is not proper to attribute to live television trial

coverage blame for more than its share of trial publicity.

It is stated on Page 11 of the *amicus curiae* brief filed by the American Civil Liberties Union that:

"The mere fact that Estes' jurors were instructed to disregard newspaper and television comments on the case . . . was also ineffective in light of the *overwhelming likelihood* of extraneous information reaching jurors through television." (Emphasis added.)

We ask the Court to consider, as a general matter, how much of that "overwhelming likelihood" it is proper to attribute to the live television coverage of any trial. However, it is puzzling in the extreme that the American Civil Liberties Union should make this claim with particular respect to "Estes' jurors" in view of Art. 668 of the Texas Code of Criminal Procedure:

"Art. 668. Separation of jury

After the jury has been sworn and impaneled to try *any felony* case they shall *not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the State and the defendant, and in charge of an officer.*" (Emphasis added.)

Since the jurors were not permitted to separate, it is wrong to say that the judge's instructions were "ineffective." They had no opportunity to watch television during the trial or to read newspaper accounts of it.

The American Civil Liberties Union on p. 4 of its brief recognizes a distinction between pre-trial publicity and live television trial coverage. However, it does not follow that since the latter *can* be totally elim-

inated it *should* be. After referring to the cases of *Rideau v. Louisiana*, 373 U.S. 723 (1963), *Stroble v. California*, 343 U.S. 181 (1952), and *Irvin v. Dowd*, 366 U.S. 717 (1961), and pointing out that these cases involved pre-trial publicity, the brief states that:

“... where a court can eliminate *this substantial threat to a fair trial simply by barring telecasting of the proceedings*, it is unconscionable for a defendant to be exposed to such intensive publicity.”
(Emphasis added.)

This comment equates the nature of the pre-trial publicity in these three cases with the nature of the live television coverage present in the *Estes* trial. In these three cases a total of eight people were murdered and three were kidnapped. The locales in which these cases were ultimately tried were saturated with publicity concerning the facts and details of these crimes, including among other things the confessions of all three defendants. Each of these defendants was sentenced to death. Is it then appropriate to say in the context of the present case that “this substantial threat to a fair trial” can be eliminated “simply by barring telecasting of the proceedings”? We ask the Court to examine what actually happened in this trial. It is certainly a misstatement of the facts to say, as does the American Civil Liberties Union on page 2 of its brief, that: .

“*From the outset the proceedings were televised live, the trial court overruling petitioner’s constitutional objection to television coverage.*” (Emphasis added.)

VII

The right of the public to acquire knowledge is a fundamental concept in the history of this nation,

and it should not be limited unless there is a compelling need and unless the limitation is responsive to the need.

It is not our purpose to attack Canon 35, and we make no claim that it abridges the First Amendment guarantees of freedom of the press. However, we do take issue with the assertion made in the following comment appearing on p. 11 of the Association's brief:

"What is involved is not freedom of expression but *simply the regulation of access to the courtroom by certain media equipment.*" (Emphasis added.)

We submit that it is not "simply" a matter of access by certain media equipment. There is nothing sacrosanct about a television camera or the printed or spoken word. Their relevance and the *raison d'être* of the free speech and press provisions of the First Amendment lie in their bearing on the right of the public to *know*. The Founding Fathers knew, as we all do, that where a government is responsive to the will of the governed, that will must be the expression of an informed electorate. The fundamental purpose of the First Amendment was not to protect newspapermen. Its purpose was and is to assure to the public the broadest possible opportunity to acquire knowledge. And for purposes of creating a society capable of maintaining high standards of self-government that knowledge which is most important relates to the very functioning of the government itself. Thus the right of the public to *know* is a right of fundamental importance.

Certainly there are limitations on this right. It is limited in matters affecting the national security. Grand jury proceedings generally are not subject to public scrutiny. However, these limitations must not

be lightly imposed. This right must not be restricted unless there is some compelling need *and* unless there is a reasonable empirical basis which indicates that the restriction is required to meet the need.

We submit that much of the analysis contained in the Association's brief is general and based on speculation unrelated to the events which actually occurred in the Estes trial. We think that the constitutional interpretation urged by the Association is unwise.

The means of mass communication have been greatly improved since adoption of the First and Fourteenth Amendments. The new methods and techniques are no less important than the old. The complexity of the modern world requires the fullest use of these techniques to assure the widespread dissemination of information and ideas, so long as that use does not interfere with other basic rights. In the context of an appeal to this Court it should be shown that there actually was such an interference.

It must be remembered that none of the testimony was televised live. The testimony was only recorded at sporadic intervals, and then on tape or film *without sound*. When the main force of the argument is directed at the disturbing effects of live television coverage during the taking of testimony, is it appropriate to apply it to a case in which there was no live television coverage during that period?

The arguments of the petitioner, the Association, and the American Civil Liberties Union do not constitute a sound basis for making the reversal of this case a constitutional imperative. Whether petitioner was denied due process and the equal protection of the laws by the controlled and limited live television coverage of his trial is a question of fact.

Conclusion

For the reasons stated, the judgment should be affirmed.

For the State Bar of Texas:

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March 16, 1965

BAYLOR UNIVERSITY

ABNER V. McCALL • President

Waco, Texas 76703

March 11, 1965

Mr. Davis Grant
General Counsel
State Bar of Texas
201 W. 15th
Austin, Texas


Dear Mr. Grant:

In reply to your inquiry as to the televising of the trial of State v. Washburn in 54th District Court in Waco, Texas, in December, 1955, you will find a report thereof in the February, 1956 issue of the State Bar Journal.

There was general publicity when Judge D. W. Bartlett of the 54th District Court announced that television station KWTX of Waco would be permitted to televise the entire trial. This was reported to be the first time a trial was to be televised. At the time I was the dean of the School of Law of Baylor University and was also serving that year as president of the McLennan County Bar Association. I received a telephone call from the chairman of the committee of the American Bar Association concerned with such matters requesting that we arrange to observe the trial and the effects of the television and make a report thereon to the committee. He offered to reimburse us for the necessary expenses.

I arranged with Mr. Cullen Smith and Mr. Hilton H. Howell, two young Waco attorneys, to cover the trial, survey the effect of televising it and make a report thereon to the American Bar Association committee. This they did. At the request of some official of the State Bar of Texas they also prepared from their report an article for the State Bar Journal, published in February, 1956.

Sincerely,



Abner V. McCall
President

AVM:cp

APPENDIX

REPORT OF WASHBURN TRIAL TELECAST

Prepared by Waco-McLennan County Bar Association

In Waco on December 6, 1955, in the 54th Judicial District Court of McLennan County, Texas, the trial of Harry L. Washburn began. He had been indicted for murder with malice of Mrs. Harry Weaver, his former mother-in-law, who was killed in the explosion of a bomb as she entered her car parked in the garage of her San Angelo home.

On December 9, at 6:25 P.M., the jury returned its verdict of guilty and assessed Washburn's punishment at life imprisonment.

The case had been transferred to Waco on change of venue. There was not much local interest in the trial as the jury was selected on Monday, but by Tuesday afternoon, there were few people in Waco within miles around that had not watched at least a part of Washburn's trial. For the first time a real murder trial was being televised.

World-wide News

The news went out over the wire services and incredulous editors from all over the United States and across the Atlantic called Waco for more information. Newsmen took thousands of pictures of the trial with still and movie cameras. The world turned its eyes to the Waco courtroom as the story was carried in every major newspaper in the free world. This was news because a television camera was there.

News reporters have for some years been accorded

a place in the courtroom to report trials during the actual proceedings. With the development of photography, radio and television as important media for the dissemination of news and information newsmen wanted to bring their new equipment into the courtroom. Judges and lawyers have, of course, been zealous to maintain the dignity and decorum of the courts and to insure that rights of the parties litigant were not adversely affected by the focusing of a lens representing a vast and unseen audience. The effects a camera might have upon witnesses, the court and the jury were not known, but lawyers knew from experience that a "reasonable man" too often became a clown or a shy child before a harmless box camera.

The American Bar Association adopted Canon 35 of the Canons of Judicial Ethics prohibiting photographing or broadcasting court proceedings and in 1952, televising court proceedings was prohibited in the Canon. Except for a provision allowing supervised televising of naturalization proceedings, the following is the text of the Canon:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

This Canon succinctly expresses the principal objections leveled to allowing radio, television and cameras in courtrooms. Several states have by law prohibited photographs during trials and Rule 53, Federal Rules of Criminal Procedure, provides:

"The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."

Texas has no such rule or statute, so the question here, as in many other states, is left to the discretion of the trial judge, much as is the control of the behavior of spectators. This may not be an entirely satisfactory solution since, if the objections pronounced by Canon 35 quoted above are valid, cameras, radio and television should be absolutely prohibited.

Ban Imposed

Since the Washburn trial, a California court has refused permission to televise a criminal trial and the Colorado Supreme Court has imposed a ban on the use of cameras and recorders in all trials.

A Denver television station had planned to film and possibly televise the trial of John Gilbert Graham, accused of dynamiting the United Air Lines plane which crashed and killed 44 persons, including his mother. The Court, however, granted a hearing on its ban and evidence will be adduced at the hearing by news and television men in an attempt to have the ban relaxed or removed. The reactions to the telecast of the Waco trial have been requested for presentation at the hearing.

Study Underway

Before the Washburn trial, the American Bar Association had referred Canon 35 to a committee for study after urging that its restrictions should be relaxed or removed.

The question of whether cameras, radio and television should be allowed in trials and if so to what ex-

tent, must be satisfactorily answered. If they are allowed, will they make a spectacle or show of what must be a dispassionate hearing in which truth is the quest? Will the objections raised in Canon 35 be realized?

In hopes that the reactions to the Washburn trial may be of value in reaching a proper answer, the Waco-McLennan County Bar Association has compiled this report.

Television

Bill Stinson, news editor of KWTX-TV, first obtained the consent of D. W. Bartlett, judge of the 54th Judicial District Court, before whom Washburn was being tried, to allow televising of the trial. The attorneys on both sides and the defendant himself either consented or made no objection to the request to televise. Judge Bartlett had previously allowed photographs to be taken in proceedings before him so long as no flash attachments were used and the photographers did not interfere with or disturb the trial. The same restrictions as to special lights, noise and disturbance were imposed upon the television men.

In the 54th Court, there is a balcony around three sides of the courtroom, about 12 feet above the main floor. The television camera was placed in the balcony to the right and rear of the jury box so that the jurors could not see the camera unless they pointedly turned and looked up. The camera pointed toward the judge and witness chair and over the left shoulders of the attorneys.

One Cameraman

One man operated the absolutely silent camera, which had four lenses from 50 mm. to 15 in. for different shots and close-ups. The only other television equipment in the courtroom was on a small table in the bal-

cony behind the jury, where Gene Lewis, KWTX-TV program director, sat silently watching the monitor screen and turning dials on the remote equipment during the telecasting. Occasionally, he murmured into a small microphone a fraction of an inch from his mouth, giving instructions heard only by the cameraman wearing headphones.

The telecasting began at 9:00 A.M. Tuesday morning, December 6, as the judge called the court to order and the indictment was read to the jury. The entire proceedings in open court were televised with the camera focused on the attorneys and witnesses under examination and on the judge as he gave instructions or ruled on objections. Stinson and Lewis, who directed the telecasting, instructed the KWTX-TV cameraman never to direct the camera on the jury. The members of the jury were not shown on the television screen until they brought in their verdict.

All programs and commercials were stopped during the telecasting of the trial and there were no commercials during breaks in the trial except when the regular program schedule was resumed during recesses for meals and in the evenings. No editorial comments were made by television announcers interpreting developments. Brief statements identified the trial and its principals and short explanatory announcements were made when the judge and attorneys retired for a hearing on an objection.

Still Cameras

Still cameramen were allowed to take pictures during the proceedings provided they used no flash bulbs, did not disturb the trial, and did not interfere with the movements of the attorneys. They were allowed inside the trial area enclosed by the rail, where they sat or stood to take pictures.

At one time, two photographers from a magazine of worldwide circulation were instructed by Judge Bartlett to leave when they stood between the attorneys and the jury to take a picture of a witness.

Thousands of photographs were taken by many cameramen and although there was little or no attempt to hide the fact that they were taking pictures, their actions were apparently no more disturbing than those of the spectators.

Movie Cameras

Movie cameramen filmed part of the trial from various points in the balcony and from the floor of the courtroom. The judge restricted the motion picture cameras to those which were relatively silent and in his office during recesses, he refused to allow the use of some cameras that made rather loud clicking noises.

Two motion picture cameras on tripods about five feet high were placed at the rail a few feet from the jury box while the jury was out for its deliberations. The jury was filmed as it returned the verdict.

Press Reporters

There was a special table for press reporters directly in front of the judge's desk and between the judge and the counsel table. From three to ten reporters sat at the table or nearby, taking notes on the proceedings.

Audience Response

KWTX-TV requested that the viewers of the trial express to the station their opinions of approval or disapproval of televising the trial. The television station reported that they received several hundred, but uncounted, telephone calls which were preponderantly favorable to the telecasting of the trial. They reported

that most of the unfavorable calls were from children or parents who objected to the omission of the children's programs regularly telecast in the afternoon.

Over 1,400 letters and cards were received by KWTX-TV from Central Texans who saw all or parts of the trial over television. They all, except for four, expressed approval and appreciation that the trial had been telecast.

Picking up cards and letters at random from the stacks on tables in the KWTX Studio, a representative of McLennan County Bar found comments such as the following were typical:

"... it is a great contribution to the education of the masses of the people in the functioning of our Democratic processes."

"By all means, give the people the facts. It is educational, constructive and enlightening for the people to SEE and know court procedure."

A minister from a nearby town stated that the telecasting of the trial was excellent and expressed his thanks. Other letters said: "Finest public service ever witnessed." "Give us more current news events in action." "It is a step forward ... to inform and educate the public." "Great example of American freedom." "Most educational matter ever to come out of our TV set."

Apparently most of the people could not see that there were any objections to televising a trial. One card stated "... great example of American freedom. Only narrowminded people could possibly have any objections, and those will be groundless."

A letter said, "I consider this to be the most progressive step that has been taken in civic education. You will, no doubt, receive some criticism; however, it is

my opinion that those who will criticize are those who take no interest in civic problems, or are those who protest any advancement or progress."

A university professor expressed his appreciation for televising the trial and wrote,

"The townspeople, the Baylor Faculty and students think that it is a great contribution to the education of the masses of the people in the functioning of our Democratic processes. I do not think you need to consider any of the adverse criticism, for it could not be legitimately based."

A school teacher wrote in to say that she had shown the televised trial to her children in school and that it was "very educational." One viewer said,

"Almost everyone is interested in a trial of this kind. By seeing it on television, they see with their own eyes and are able to draw their own conclusions. They do not have to read about it in the newspapers written by one reporter expressing HIS opinion."

Along a rather humorous vein, a woman wrote in that she was so absorbed in the trial that she could not miss one word, and that while she was at her television set, she burned a pot of beans she had been preparing for dinner. A husband wrote in that televising the trial was a great thing. "Most noteworthy around our house, is the inescapable fact, that for the first time in years, my ever-loving wife found one thing interesting enough to induce her to get out of bed before 9:00 A.M."

Of the four cards that were found expressing disapproval or objecting to the televising of the trial, three were from Waco and one was from Portland, Oregon. Two of the cards from Waco were unsigned.

Objection

One card signed "Generally, a steady listener" stated that there was more than enough about such an affair in the newspapers without having the TV channel taken up with it. "Falls in the same category as political speeches."

An unsigned member of the P-TA who wrote that she had worked for years on the comic book problem objected that televising the trial brought the "morbid side of human nature into our home and schools . . ."

The one card from Waco that was signed, stated that the trial had little local interest and that her child had been crying for "Mickey Mouse." It is possible that there are more cards objecting to telecasting the trial since the station staff has not had sufficient time to read all of the responses. Bill Stinson, however, stated that there were only about 200 cards and letters that had not been read.

Judge D. W. Bartlett stated that he had received several hundred cards and letters and that they were predominantly expressions of approval and appreciation for allowing the trial to be televised.

Interviews Favorable

During recesses or after the trial, some members of the McLennan County Bar Association interviewed the judge and the attorneys who participated in the trial. Mr. Stinson of KWTX questioned the judge, defense and prosecution attorneys, witnesses, the jury foreman, the defendant Washburn, and several other people who assisted in the trial or watched it in court. All of his interviews were taken on 16mm. film with a sound track. None of the people interviewed expressed any objection or disapproval of televising the trial.

Trial Dignified

The judge stated that the fact that the trial was being televised seemed to dignify the proceedings and that this case was more orderly than any other case of like importance and public interest with as many lawyers involved. He said that there were about seven lawyers on both sides. Judge Bartlett stated that there was no "grandstanding" by the witnesses or the attorneys and that the television camera was no more distracting than a court reporter taking notes or an electric light burning in the courtroom.

The testimony of Mrs. Billy Rogers, a witness for the state, who was on the stand for about 30 minutes, was televised in its entirety. She had heard that the trial was being televised but when she was interviewed after she testified, she said that she had not even seen the television camera. She thought that her testimony had not been telecast.

Little Effect

The foreman of the jury, Mr. Jack Woods, a government teacher at University High School in Waco, said that in the first day of the trial, during a recess, he looked up and saw the television camera in the balcony. He stated that he did not believe that the television camera affected the jurors in any manner. "They probably were a little apprehensive at first when they realized that it was being televised, but within a matter of a few hours, they had apparently forgotten it." He said that he did not see any play made toward the television camera.

From their experience in the Washburn trial, none of the participants expressed any objection to televising future trials in the same manner. Generally, the

response was that they would favor it. Interviews with Judge D. W. Bartlett; Tom Moore, Jr., district attorney of McLennan County; Cliff Tupper, chief counsel for the defendant; Judge Glen J. Jenkins, a defense witness; Mrs. Billy Rogers, witness for the state; and Jack Woods, jury foreman, were transcribed from the sound track of the filmed interviews and are on file in the State Bar office at Austin.

Poll of Lawyers

A questionnaire was sent to all lawyers of the Waco-McLennan County Bar Association with a letter containing a brief discussion of the news coverage problem and quoting Canon 35. Of the sixty-one lawyers responding, each of whom signed the questionnaire, fifty-nine had observed the trial in whole or in part either from the courtroom or by television.

Including some of the objections expressed in Canon 35, one question was: "IN YOUR OPINION, DID THE FOLLOWING DETRACT FROM THE DIGNITY OF THE COURT, DISTRACT THE WITNESSES OR JURY, OR OTHERWISE DISRUPT THE ORDERLY PROCEDURE OF THE TRIAL?" Of those expressing an opinion, the following is the tabulation:

	YES	NO	% YES ANSWERS
Press Reporters -----	10	39	20.4%
Still Photographers -----	9	37	19.5%
Movie Photographers -----	10	35	22.2%
Television -----	5	47	9.6%
Spectators in Court -----	7	40	14.9%

A question asked if the action of the judge, lawyers, witnesses, jury and spectators, were discernibly affected in any way by the four listed types of news cov-

erage allowed in the trial, press reporters, still photographers, movie photographers and television. Out of about 50 responses in each of the 20 blank spaces for answers, no more than five answered that any of the types of news coverage allowed had any discernible effect. Several responses indicated that the judge was more attentive and that television improved the dignity and decorum of the attorneys trying the case.

“IN YOUR OPINION, WHICH TYPE OF NEWS COVERAGE ALLOWED IN THE WASHBURN TRIAL WAS THE LEAST DISRUPTING OR DISTURBING OF THE PROCEEDINGS? (Answer *press reporters, still photographers, movie photographers, television or others, with any desired explanation. List least disturbing first.*)” Under this question, twenty lawyers expressed no opinion or gave no listing. Of the forty-one who answered, twenty-seven or 65.9%, placed television as being the least disturbing and the remaining fourteen, 34.1% listed press reporters as being the least disturbing. Total scores by preferential voting showed that television was least disturbing of the proceedings, followed in order by press reporters, still photographers and movie photographers.

Favorable Impression

Forty-eight of the lawyers polled answered that the television broadcast of the trial improved public opinion of our system of justice. Six were of the opinion that it hurt public opinion and four felt that there was no effect. Thirty-four felt that telecasting the trial improved public opinion of the legal profession. Eight felt that public opinion was hurt and twelve stated that there was no effect.

Asked which type or types of news coverage they

would be in favor of allowing in future trials, if handled in the same manner as in the Washburn trial, the response was:

	Allow	Refuse	% Allow
Press Reporters -----	53	4	92.9%
Still Photographers -----	43	13	76.7%
Movie Photographers -----	37	17	68.5%
Television -----	49	7	87.5%

Asked about restrictions to be imposed upon press reporters, still photographers, movie photographers, and television if they were to be allowed in future trials, most of the answers indicated that they should not interfere with or disturb the trial. Such things as no noise, no movements, no moving from seats except during recesses, no questions except during recesses, were typical responses.

Frequent Response

For press reporters, the second most frequent response was that they should keep behind the rail out of the trial area or stay in the audience area. The second most frequent response for still cameras, movie photographers and television was that no flash bulbs or special lights should be used.

Out of sixty answers, forty-seven were of the opinion that leaving the problem of the types of news coverage to be allowed in trials and the restrictions to be imposed on newsmen should be left at the discretion of trial judges as questions arise. Eleven stated that it should not be left at the judge's discretion and two stated that the judge must allow the various types of news coverage.

Out of fifty-six answers, 53.3% indicated that a rule or statute should be adopted in Texas controlling the

types of news coverage to be allowed in criminal trials. Out of fifty-five answers, 50.9% said that a rule or statute should be adopted controlling the types of news coverage to be allowed in civil trials.

It is hoped that this report from the Waco-McLennan County Bar may be of some illumination to those who seek an answer to this problem now confronting our courts. The poll taken of the McLennan County lawyers was directed particularly to opinions formed from the Washburn trial and it would not be proper to generalize the opinions without realizing that they might not be valid in other cases and if telecasting of a trial were handled differently. Few courtrooms have a balcony such as was used in this case, which allowed the television camera and equipment to be operated in an obscure place.

KWTX-TV has prepared a film with sound of about 45 minutes duration of the interviews taken of the various principals in the Washburn trial. Anyone desiring to show this film may make arrangements through Wm. E. Pool, State Bar of Texas, or Waco-McLennan County Bar Association, P. O. Box 118, B. U. Station, Waco, Texas.

Canon 28 of the Canons of Judicial Ethics approved by the Judicial Section of the State Bar of Texas.

Improper Publicizing of Court Proceedings

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and wit-

nesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

In connection with the control of such coverage the following declaration of principles is adopted:

(1) There should be no use of flash bulbs or other artificial lighting.

(2) No witness, over his expressed objection, should be photographed, his voice broadcast or be televised.

(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

(4) Any violation of the Courts' Rules shall be punished as a contempt.

(5) Where a judge has refused to allow coverage or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt.

Canon 35, Canons of Judicial Ethics of the American Bar Association.

"IMPROPER PUBLICIZING OF COURT PROCEEDINGS

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs

in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

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JOHN F. DAVIS, CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

No. 256

BILLIE SOL ESTES, *Petitioner,*

v.

THE STATE OF TEXAS, *Respondent.*

On Writ of Certiorari to the Court of Criminal Appeals of Texas

**BRIEF OF THE NATIONAL ASSOCIATION OF
BROADCASTERS AND THE RADIO TELEVISION
NEWS DIRECTORS ASSOCIATION AS
*AMICI CURIAE***

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March 22, 1965



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**BRIEF OF THE NATIONAL ASSOCIATION OF
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NEWS DIRECTORS ASSOCIATION AS
AMICI CURIAE**

This brief is filed with the written consent of the parties pursuant to Rule 42 of this Court.

INTEREST OF AMICI CURIAE

The National Association of Broadcasters (NAB) is a non-profit organization of radio and television broadcasters whose membership included as of March 17, 1965, 2140 AM stations, 837 FM stations, 461 television stations and all the radio and television nationwide networks. This brief is submitted by NAB in furtherance of the objective of the Association which in accordance with its by-laws:

“... shall be to foster and promote the development of the arts of aural and visual broadcasting in all its forms; to protect its members in every lawful and proper manner from injustices and unjust exactions; to do all things necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public.”

The Radio Television News Directors Association (RTNDA) is a non-profit organization of radio and television news directors which also embraces an associate membership of persons actively-engaged in the reporting, writing or editing of news for radio and/or television. It has approximately 700 active and associate members. The general purpose of RTNDA, as stated in its constitution, is to advance “radio and television news media and our common rights to the Freedom of Speech and the Freedom to View and Listen.”

The fundamental issues which are to be reviewed in this case are of vital concern not only “to the American Bar Association and its nearly 120,000 members” (Brief at p. 2) but to nearly 200,000,000 Americans. Today, the burden of being the primary source of

news to most of the people in this country has shifted from the newspapers to broadcasting.¹ In spite of this reliance by a majority of Americans on radio and television for their news, however, most of the courts are still closed to microphones and cameras.

For ten years NAB and, more recently, RTNDA have sought without success to convince the American Bar Association (ABA) that it should explore further the feasibility of broadcasting trials. The most recent effort was a proposal by both associations that they cooperate with the ABA in the establishment of committees composed of representatives of bench, bar and media to conduct a series of tests on a nationwide basis in an effort to obtain a functional appraisal of some of the problems inherent in court coverage. This offer, which is reprinted as Appendix A, was rejected by the ABA.

ARGUMENT

Preliminary Statement.

The primary concern of all must be the proper administration of justice. To insure its achievement, our system of government relies not only upon the bench and bar but also upon the general public. The enlightenment of the populace through meaningful access to courtroom proceedings is an historically-created check upon the maladministration of justice. What courts do is not just the business of the bench and the bar. It is a prime concern—a first responsibility—of the whole body politic. To this end the law must fully avail itself of all improved means of communication.

¹ Elmo Roper & Associates, *NEW TRENDS IN THE PUBLIC'S MEASURE OF TELEVISION AND OTHER MEDIA* 2 (1964).

There are several basic propositions with which broadcasters fully agree:

- That the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media;
- That the due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial;
- That, to assure a fair trial, it is the duty of the presiding judge to preserve order in the courtroom; to anticipate and prevent so far as he can any conduct which would be calculated to create disorder; and that he has inherent power to do so.

This then brings us to the area of disagreement with those who would assume that the presence of broadcasters in the courtroom is incompatible with these fundamental provisions.

This Court is being asked by the ABA to go beyond the precise question and the factual situation in the case at bar; to elevate Canon 35 to a constitutional mandate; and to reach an inflexible determination that the administration of justice cannot accommodate itself to the most modern means of communication without violating the defendant's right to a fair trial. NAB and RTNDA will demonstrate in this brief that no such blanket holding is warranted but, on the contrary, that broadcast reporting of court proceedings, subject only to proper controls by the trial judge, is not only fully compatible with the defendant's right to a fair trial but also promotes positive public benefits as envisioned by the framers of the Constitution.

I. Courtroom Reporting By Broadcast Media Is an Implicit Element in Our Constitutional System and Promotes the Administration of Justice.

A cardinal purpose of any civilized society is to secure the safety of its people. A free and democratic system adds the purpose of fostering individual liberty. Our government safeguards an individual in the assertion of his rights only so long as he does not impair the safety of society or the liberties of any other individual. The liberty and safety of each person is equally important. These elementary principles are perforce applicable to criminal trials. Involved in every criminal case are the safety and liberty of the society which the defendant is alleged to have offended and the defendant's personal liberty and right to a fair trial. The fair administration of justice commands "that guilt shall not escape or innocence suffer."²

The immediate effectuation of these precepts has been entrusted to a variety of governmental organs—committing magistrates, grand juries, prosecutors, petit juries, trial courts, appellate courts, etc. Unfortunately, however, history has taught that courts and officers of the law are not perfectly competent or always incorruptible. And it is also true that maladministration of justice is not uniformly adverse to the defendant but frequently operates to his benefit and adverse to the interests of society. The disposition of many charges brought against whites for crimes committed towards Negroes in certain sections of this country illustrates this truth.

To aid in the prevention of miscarriages of justice, our constitutional system of government has created

² Berger v. United States, 295 U.S. 78, 88 (1935).

a court of ultimate review—the people acting through the force of public opinion and as an informed electorate. As Mr. Justice Frankfurter observed in *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 920 (1950):

“One of the demands of a democratic society is that the public should know what goes on in the courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.”

And, as Mr. Justice Black stated in *Barr v. Matteo*, 360 U.S. 564, 577 (1959):

“The effective functioning of a free government like ours depends largely on the force of an *informed public opinion*. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees. Such an *informed understanding* depends, of course, on the freedom people have to applaud or to criticize the way public employees do their jobs, from the least to the most important.” [Emphasis added.]

In order for the people to adequately perform this function, their information must be as complete and accurate as is possible. The more facts that are available, the greater certainty that public opinion and action will be well-considered and effectively directed towards promoting the fair administration of justice. But all of the people can never be present to observe the factual events upon which they are to base their judgments. They must depend upon conduits—other individuals, magazines, newspapers, radio and television. To the extent, then, that these agents of public information are hindered in the performance of their

critical tasks; the people are less competent to fulfill their role as the court of ultimate review.

We submit that the framers of the Constitution recognized the critical importance of these agents by providing for freedom of speech and press in the First Amendment and by opening criminal trials to the public in the Sixth Amendment. While neither of these two amendments speaks of an unlimited right of access to the courtroom on the part of the broadcasting media, it is clear that their underlying purposes will be subverted unless radio and television are permitted to present live coverage of judicial proceedings subject only to those reasonable controls necessary to prevent *clearly demonstrated* intrusions upon the fair administration of justice. Of course, we do not contend that the broadcasting media possess a right of access to governmental proceedings or private meetings that lawfully bar the public.³ We do urge, however, that the broadcasting media have a right to be present at, and to transmit from, all proceedings which are open to the public. This right is a reflection of the societal interests underlying the First and Sixth Amendments.

These societal interests are a general interest in enlightenment and an interest in preventing judicial abuse of the public's and the defendant's right to a fair trial. Both the advancement of knowledge and the requisite critical discussion of the performance and qualifications of public officials in all branches of our government presuppose the ability to gather

³ This Court has consistently held that constitutional rights, including freedom of the press, are not absolute. E.g., *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945); *American Communications Ass'n, CIO v. Douds*, 339 U.S. 382, 394 (1950).

information. "An informed understanding" cannot be built upon surmise or conjecture. The process of news dissemination necessitates the acquisition of facts, their sifting and analysis, and their publication and distribution. Each one of these functions is an integral part of the total process. The capacity to discover and gain access to information, therefore, is vital to the protection of the public's interest underlying the First⁴ and Sixth Amendments.

As this Court stated in *In re Oliver*, 333 U.S. 257 (1948):

"[T]he guarantee [of a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.* at 270.

* * *

"Other benefits attributed to publicity have been: (1) Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony.^[5] . . . (2) The spectators learn

⁴ The Petitioner has conceded "that an unreasonable restriction upon obtaining information by the public would be fairly included in the abridgement of free speech, and of the press, proscribed by the First Amendment." Brief at p. 7. See also *id.* at p. 36 where the Petitioner states: "We believe the right to 'know' and to 'find out' information regarding a criminal case is part of the first amendment guarantee of 'free speech.' Otherwise speech would be mere gossip or 'tittle-tattle.'"

⁵ Wiggins, FREEDOM OR SECRECY 36 (Rev. ed. 1964) details an instance in which newspaper publicity caused a criminal to surrender during the trial of one wrongly accused of the same crime (after the trial court had denied defendant's motion that the press be excluded).

about their government and acquire confidence in their judicial remedies." *Id.* at 270 n.24.

Professor Wigmore cited additional societal benefits flowing from the Sixth Amendment. He noted that a public trial is security for testimonial trustworthiness and that, in acting under the public gaze, judge, jury and counsel are more strongly moved to a strict conscientiousness in the performance of duty. 6 Wigmore, EVIDENCE § 1834 (3d ed. 1940). This Court has recently indicated that the public's interest in a public trial is a shared right with the right of the defendant. In *Singer v. United States*, No. 42, Oct. T., 1964, decided March 1, 1965, this Court, in denying the existence of an absolute right in the defendant to compel a bench trial without approval of the court and consent by the government, stated (Slip Op. p. 11):

"[A]lthough a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States v. Kobli*, 172 F.2d 919, 924 (C.A. 3d Cir. 1949) (by implication)"

The Court of Appeals in *Kobli* at the page cited by this Court stated:

"While, as has been suggested, the right thus accorded to members of the public to be present at a criminal trial as mere spectators may not be wholly logical it has been imbedded in our Constitution as an important safeguard not only to the accused but to the public generally."⁶

It can be seen that broad societal interests underlie the guarantees of a public trial and of free speech and

⁶ See also *Craig v. Harney*, 331 U.S. 367, 374 (1947), stating that "a trial is a public event. What transpires in the courtroom is public property."

a free press. These latter rights are means through which the public is to be enlightened so that they may act to uphold their interests, as well as the defendant's interests, in the fair administration of justice. In order for these means to be effective, however, there must be something more than a mere right to be present. Obviously, only a minute segment of the public can be present at any one time. The public must depend upon other means of obtaining information. And, to the extent that such conduits as spectators or newspapers fail to convey adequate information, the public's interest are not upheld when broadcasting is barred.

Access in this modern age must include access with microphone and camera, particularly in view of the fact that more people rely upon broadcasting than upon newspapers for news.⁷ These tools enable the broadcasting media to effectuate a more accurate presentation of the aural and visual events and atmosphere of a judicial proceeding than is possible through the utilization of "second-hand" methods even when the latter purport to directly quote from the proceedings. Factual reports, even if originally correct, are distorted almost in direct proportion to the number of stages of recital that are employed. Even a stenographic transcript, assuming the improbability of its wide distribution, is handicapped by its failure to produce "the sights and sounds" of the proceedings, including, importantly, the witness's demeanor.

Thus, there is a basic public interest founded in our constitutional system of government that impels the conclusion that trials should be broadcast. This does

⁷ See note 1 *supra*.

not mean that the representatives of the press (electronic or print) have a constitutional right to conduct themselves in a court room in a manner that offends the dignity and decorum of the court. Such offenses can be committed by any person present, but the court has the power to prevent such offenses.

"An intoxicated man could have been excluded or removed; the aisles and passageways could have been kept clear; when the seats were filled, other spectators could have been denied at the door; if the noise in the lobbies interfered with the proceedings, the lobbies could have been cleared; and individuals whose conduct outside the courtroom made their presence within a menace might have been excluded. But it is quite a different thing to exclude the public generally, regardless of their conduct or character." *Davis v. United States*, 247 Fed. 394, 395 (8th Cir. 1917).

We concede the judicial power and duty to control pending proceedings so as to remove such threats to a fair trial, or to eliminate other factors that have been empirically shown to impair a fair trial. We submit, however, that the judiciary has neither a duty nor the power to impose a total *prior restraint* on the broadcasting of judicial proceedings.⁸

Furthermore, if this Court determines, as we contend that it must, that justice can be fairly administered even though cameras and microphones are pres-

⁸ We are well aware that this proposition casts doubt upon the constitutionality of the judicial adoption of Canon 35 of the American Bar Association's Canons of Judicial Ethics and related rules prohibiting broadcasting of judicial proceedings. However, since Canon 35 was not utilized in the instant proceeding, a decision on the merits of the conviction below may be made without now reaching a decision upon the constitutionality of these exclusionary rules.

ent, the blanket denial of broadcast coverage by courts will be an unreasonable discrimination against broadcast journalists. There is no reason why broadcast newsmen should not be allowed to utilize their reportorial tools in situations where the newspaper reporters may use theirs. To hold otherwise would create a discriminatory classification that has no reasonable relation to the differences between the news media, and hence would be a denial of the equal protection of the laws. As this Court has stated in another context, "equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

**II. Reporting from the Courtroom by Camera and Microphone.
Properly Controlled by the Court, Does Not Deprive a
Defendant of Due Process of Law.**

Petitioner and his supporting *amici curiae* argue that the mere presence of television in a courtroom prevents a fair and proper administration of justice. They conclude, without substantiation, that each of the principal trial participants—juror, judge, counsel and witness—is so likely to be adversely affected by broadcast coverage that he would be unable to function in a manner consistent with the requirements of a fair trial. This conclusion is not based on fact. Rather it is presented in a parade of conjured horrors without supporting evidence.

In the most comprehensive study concerning the effects of photography, radio and television on the judicial process, the opposite conclusion was reached by the Supreme Court of Colorado.⁹ Because we believe that the report of Mr. Justice Moore, adopted

⁹ In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 132 Colo. 591, 296 P.2d 465 (1956).

by the Colorado court, is of great importance to a fair evaluation of the merits of the question, we are attaching a copy as Appendix B. An objective appraisal of the experience and judgments set forth in the report will show the unsoundness of the argument that broadcasting court proceedings is inconsistent with the fair administration of justice.

The Colorado Supreme Court has given the trial judge discretion to determine in each case whether and under what circumstances cameras and microphones should be permitted in the courtroom. After five years of experience with Colorado's discretionary version of Canon 35, Frank H. Hall, Chief Justice of the Colorado Supreme Court, reported:

"We have experienced no difficulties with reference to Rule 35. Though the rule has not received the blessing of the American Bar Association, we have not been urged by anyone in interest to modify or repeal any portion of it. Naturally judges make no complaint, for they have the discretion Up to the present time, no complaints have been received from litigants, lawyers, jurors or witnesses." Hall, "Colorado's Six Years' Experience Without Judicial Canon 35," 48 A.B.A.J. 1120, 1121 (1962).

Colorado was concerned with realities, not conjecture. The bench and bar did not assume *a priori* that every use of camera or microphone must in every judicial proceeding interfere with the administration of justice. As judges and lawyers, they were willing to investigate and to arrive at an empirical judgment based on the record.¹⁰

¹⁰ The ABA rejected a similar opportunity to investigate the merits of television coverage of trials. (ABA Brief pp. A-16 to A-18.) See proposal of NAB and RTNDA, Appendix A of this brief.

In every situation known to us where broadcasting of courtroom proceedings has been permitted under proper judicial control, the conclusions reached have been comparable to those set forth by the Colorado justices. For example, a murder trial was televised in Waco, Texas in December of 1955. Following the trial, all members of the Waco-McLennan County Bar Association were asked: "In your opinion, did the following detract from the dignity of the court, distract the witnesses or jury, or otherwise disrupt the orderly procedure of the trial?" The choices were: press photographers, still photographers, movie photographers, television, and spectators in court. A greater proportion of the attorneys who answered the questionnaire felt that *spectators in the courtroom interfered more with the orderly procedure of the trial than did the presence of television*. Eighty-seven percent of the attorneys who answered said that they would allow television in the courtroom and 78 percent thought that the admission of cameras ought to be left to the discretion of the judge. Wiggins, FREEDOM OR SECRECY 61 (Rev. ed. 1964).

Tabulations of answers on a ballot received from 300 attorneys and 30 judges in the State of Oklahoma in 1956 showed that 58 percent of the attorneys who had some experience with live courtroom television favored some use of it, while 36 percent of those without such experience favored it. This same trend appeared in the poll of judges: 78 percent with experience favored live courtroom television while 52 percent of those without such experience favored it.¹¹ These figures

¹¹ "Attitudes of the Legal Profession in Oklahoma Toward ABA Canon 35"—a study by Professor Sherman P. Lawton of the University of Oklahoma (1957).

imply that much of the reluctance of bench and bar to permit the broadcasting of courtroom proceedings stems from a fear of the unknown.

In the past it was often contended that broadcasting apparatus in the courtroom endangers the dignity and decorum of the court. Even the ABA has recognized that this argument is antiquated (ABA Brief, p. 23). Cameras and microphones need not be visible or audible. Since radio and television has demonstrated its ability, consistently with dignity and decorum, to present church services, deliberative sessions of the United Nations and the ABA House of Delegates, and the last homages paid to President Kennedy and Sir Winston Churchill, there is little doubt that the broadcast media can give the public access to the sights and sounds of a courtroom without disturbing the proceedings.

Presently, the chief attack against broadcast reporting from the courtroom is that such coverage adversely affects each of the principal trial participants so as to impair his ability to function in a manner consistent with the requirements of a fair trial. The parties advancing this proposition substitute assertion for facts. Moreover, most of the arguments made against the "psychological impact" of broadcast coverage may be made in regard to newspaper coverage, yet no one seriously suggests the blanket exclusion of newspaper reporters from the courtroom.

It has been urged that the exposure of jurors to filmed or taped portions of the day's trial in nightly replays would distort their perspective. Exposure to exterior influences is just as implicit in newspaper publishing or gossip. The answer to these problems, if the judge's standard admonitions to the jury do not

suffice, is not the imposition of prior restraints upon newspaper and broadcast trial coverage, but rather the sequestration of the jury.¹²

The American Civil Liberties Union and the Texas Civil Liberties Union, as *amici curiae*, have argued (Brief at pp. 16-17) that prospective jurors would be prejudiced by courtroom telecasting in the event a new trial is ordered. But this potential prejudice is always present in a widely-publicized trial, with or without reporting of the nature under consideration here. Newspapers and magazines of great circulation provide "interpretation" which could invade the juror's province of decision-making as much if not more than could the accounts carried on television and radio.

The contention that trial judges would be pressured by the broadcast media to open the trial courts to them in every case, no matter what the special circumstances, ignores the fact that "judges are supposed to be men of fortitude, able to thrive in a hardy climate."¹³ It hardly becomes the ABA to defend Canon 35 with

¹² The *amici* supporting the petitioner's position attempt to buttress their arguments alleging prejudice flowing from the broadcasting of the trial by reference to the fact that telecasts of the two-day hearing (September 24-25, 1962) on petitioner's motion to exclude the broadcasting media might have been viewed by some of the already-impaneled jurors. ABA Brief, pp. 12-13; Brief of the American Civil Liberties Union and the Texas Civil Liberties Union, pp. 11-14. Assuming *arguendo* that a juror did witness a re-run of this preliminary proceeding, it is crucial to note that not one single piece of evidence was introduced until much later, after the State's opening argument delivered on October 22. Since the jury was sequestered without access to radio or television from October 22 until their verdict was rendered, no extra-judicial evidence could have possibly prejudiced any juror.

¹³ Craig v. Harney, 331 U.S. 367, 376 (1947).

forebodings that, unless that Canon is enforced by the Supreme Court, judges and counsel will violate other more basic ethical standards of the legal profession. The suggestion that a judge will act contrary to the interest of justice if his person is being viewed by a large audience is both farfetched and insulting to the judiciary. The contention that a prosecutor or defense counsel might be led to posture before the cameras to the detriment of interests he represents is not only degrading to the great mass of the bar but it is also illogical. It is extremely doubtful that even the most publicity-conscious and egotistical attorney would strut and orate any more or less before a camera or microphone than he would before newspaper reporters, the jury and other spectators. Moreover, since losing the case would not enhance his reputation, we must assume that he would perform in a manner which he deemed most consistent with making the optimum appeal to the trier of the facts rather than to the radio and television audience.

It has been argued that counsel and witnesses will be under undue pressure by the knowledge on their part that they are performing before a large unseen audience. Any effect on counsel or witnesses which might result from the addition of an unseen audience is purely conjectural. It is not uncommon today to find microphones and taperecorders in courtrooms for purposes of amplification and recording. Moreover,

"... [O]ur judicial history is not barren of experience with a sudden and very substantial audience increase. Early in the nineteenth century, news of what went on at a court trial was dependent upon the hurried notes and the recollections of the newsmen who were present. In the forties, shorthand was invented, and, before long, accurate

word-by-word reports of the testimony could be published. The number of the audience was thus multiplied many fold. But this development did not lead to the adoption of canons of ethics decrying the practice as improper. The effect of this new practice was similar in many ways to what would happen now if broadcasting were allowed, but the change then was not so pinpointed in the time of its advent, and it was not so dramatic." Lyman, "Courts, Communications and Canon 35," 46 A.B.A.J. 1295, 1297 (1960)...

To the extent that there is theoretically any impact upon counsel or witnesses because of the novelty of a new reporting device, the impact would dissipate as the novelty wears off.

In the final analysis, the problem of broadcast coverage of courtroom proceedings is not essentially different from other problems of maintaining proper decorum in the courtroom. The trial judge, empowered with the authority to control conduct in his courtroom so as to insure the proper administration of justice, is the person to determine when a situation exists that would preclude a fair trial. His function would be no different with respect to abuses by broadcast media than with other media and spectators. There is no problem of lack of uniformity in proposing this case-by-case method because the purpose is to prevent abuses in light of the circumstances of the particular case. The trial judge, within his discretion, can set the proper requirements to fit the needs of the individual case; some situations will require more control than others.

Inside the courtroom, broadcast newsmen and technicians are under the supervision of the court, and

the judge may lay down explicit ground rules of pictorial and sound coverage in order to avoid any interference with the proceedings. The judge (and counsel) need give little or no attention to the cameras and microphones once these ground rules are established, unless unusual circumstances arise after the trial has begun.

Whatever doubts this court may have about the wisdom of broadcast coverage of trials in general¹⁴ or about this case in particular, the Court should not accept the ABA's argument that radio and television coverage of trials must be subjected to a blanket condemnation even though properly controlled by the trial court. Such a condemnation is not required under any of the standards enunciated by this Court. Properly controlled coverage does not create a "probability of unfairness," *In re Murchison*, 349 U.S. 133, 136 (1955); nor is there "manifest error" because the proof of unfairness is "clear and convincing," *Irvin v. Dowd*, 366 U.S. 717, 723, 725 (1961); nor is this a case where "the conclusion cannot be avoided" that the courtroom trial in such circumstances is "but a hollow formality," *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

Writing for a unanimous Court in *Holt v. United States*, 218 U.S. 245, 251 (1910), Mr. Justice Holmes rejected a defendant's allegations of prejudicial newspaper publicity by noting that "if the mere opportunity for prejudice or corruption is to raise a pre-

¹⁴ The principal arguments relied upon to attack the presence of television and radio in trial courts are almost completely inapplicable to appellate court proceedings. In the latter, there are no jurors to be improperly influenced, no witnesses to be unnerved, and even less possibility that, in the quiet atmosphere provided for appellate advocacy, the judges and counsel will play to the galleries.

sumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."¹⁵ Therefore, Petitioner is incorrect in stating that "it is enough to condemn the practice if there is a real *possibility* this may be the *occasional* result." (Brief at p. 12; emphasis added.) The proponents of Canon 35 have the burden of proving that unless the Canon is enforced a defendant is denied due process of law. This burden has not been met.¹⁶

The Court should not clothe this ABA rule in the majesty of the Constitution when the premises of the rule are, at the least, open to serious question. This is not a case like *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), in which the Court could state that it is an "obvious truth" that a poor person cannot be assured of a fair trial unless counsel is provided for him. In the case at bar, the existence of any harm caused by broadcast reporting has not been established. On the contrary, the countervailing constitutional and social interests in favor of broadcasting courtroom proceedings have been clearly demonstrated. If, on this record, the Court raises Canon 35 to the level of a constitutional mandate for all cases, many of the important questions of fact remaining to be answered will probably forever go unanswered.

We urge the Court to reaffirm its position as stated in *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956):

"While this Court stands ready to correct violations of constitutional rights, it also holds that 'it

¹⁵ [Emphasis added.], quoted in *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956).

¹⁶ Cf. *Swain v. Alabama*, No. 64, Oct. T., 1964, decided March 8, 1965.

is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality.¹⁷

Conclusion

For the reasons stated, we respectfully submit that the Court should hold that broadcast reporting of court proceedings is an implicit element of our constitutional system, promotes the administration of justice and, properly controlled, is consistent with the right to a fair trial.

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March 22, 1965.

¹⁷ This proposition was restated in *Beck v. Washington*, 369 U.S. 541, 558 (1962), like *Handy*, a case of allegedly prejudicial pre-trial newspaper publicity.

APPENDIX A

PROPOSAL

OF THE

NATIONAL ASSOCIATION OF BROADCASTERS

AND THE

RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

SUBMITTED TO THE

**SPECIAL COMMITTEE OF THE AMERICAN BAR ASSOCIATION
ON PROPOSED REVISION OF JUDICIAL CANON 35**

I. BACKGROUND.

In accordance with the request of the Special Committee on Proposed Revision of Judicial Canon 35, representatives of the National Association of Broadcasters, the Radio-Television News Directors Association, and other media organizations met with the committee in Chicago, on February 18, 1962. The purpose of the meeting was to provide factual information which would assist the committee in reaching an objective conclusion in completing its assignment on the study of Canon 35.

Mr. Cheverton, President of the Radio-Television News Directors Association, in his statement to the Special Committee at Chicago, proposed that a group of cities of varying size and location be selected for a series of tests of broadcast coverage of courtroom trials, either on a closed-circuit basis or on the air, in accordance with local ground rules established in each instance. Mr. Frank Fogarty, Chairman of the Freedom of Information Committee of the National Association of Broadcasters, included in his statement the recommendation that Bar-Media Committees be appointed throughout the country to develop controlled tests of courtroom coverage by radio and television. Following the Chicago meeting, the Special Committee re-

requested that a plan be submitted to carry out these proposals. This plan is submitted jointly by our respective organizations in accordance with that request.

II. THE PLAN.

To conduct a series of tests of radio and television coverage of courtroom trials in communities of varying size and location.

III. THE OBJECTIVE.

The objective of the proposal is two-fold:

- 1) To determine what effect, if any, the presence of radio and television has on the orderly procedures of courtroom trials.

- 2) To determine what effect broadcast coverage has on witnesses and other participants in courtroom trials in the administration of justice.

IV. OUTLINE OF PLAN.

- 1) There is attached a list of broadcasters who have agreed to coordinate experimental tests of broadcast coverage by radio and television of courtroom trials. The list represents a cross section of the United States with respect to geography and community size. It is suggested that the Special Committee select from this list the communities in which it would like experiments to be conducted. Should the committee have additional suggestions regarding other communities, full cooperation will be given to attempt to include such areas in the tests.

- 2) The coordinator in each area selected will organize a committee composed of interested representatives of the various media in the community. This committee will establish the liaison with a committee representative of both Bench and Bar.

3) It is anticipated that the American Bar Association will obtain the cooperation of the local Bench and Bar in the areas selected for the tests.

4) The National Association of Broadcasters, the Radio-Television News Directors Association, and the Special Committee of the A. B. A. will jointly agree upon the overall procedures which will govern the test program.

5) The local Bench, Bar, and Media committees shall jointly:

- (a) Determine which Court Cases are to be covered. Cases selected should be the type media would cover under ordinary circumstances, and should include, if possible, at least one civil and one criminal case.
- (b) Encourage conferences so that all parties to the experiments will be familiar with and agree upon the procedures under which the tests will be conducted.
- (c) Make arrangements for broadcast coverage on a pool basis.
- (d) Determine the type of equipment to be employed using as a guide the suggestions contained in the publication, "Broadcasting Public Proceedings", which is attached hereto.
- (e) Determine location of broadcast equipment in accordance with the suggestions contained in the aforementioned publication.

6) The local Media committee shall:

- (a) Adopt the Code of Conduct set forth in the attached "Broadcasting Public Proceedings" to govern the conduct of broadcast personnel during the course of the tests.

- (b) Determine which portions of the trial are to be covered in accordance with the exercise of normal news judgment.
- (c) Make available all material—film, tape, etc.—to the local Bench and Bar committees and the Special Committee of the American Bar Association for study.
- 7) The local Bench and Bar committees shall determine whether or not the broadcast coverage will be on a closed circuit basis, or available for live or delayed broadcasts.
- 8) Any or all of the above conditions and procedures are subject, at all times, to the final authority of the presiding judge.

V. EVALUATION.

- The method of evaluating the tests in terms of the stated objective shall be developed and agreed upon by the Special Committee and the NAB-RTNDA representatives.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF COLORADO

No. 17915

IN RE HEARINGS CONCERNING CANON 35 OF THE CANONS
OF JUDICIAL ETHICS**Report of Court**

Pursuant to the order of this Court heretofore entered, the hearings upon the question as to whether the canons of professional and judicial ethics should be continued, revoked or modified, have been concluded. The first matters considered were those based upon Canon 35 of the judicial ethics which prescribes a blanket exclusion from the court room of the press photographer and operators or radio and television instruments.

Many witnesses appeared, many arguments were heard, and numerous demonstrations of modern devices applicable to photography, radio and television were performed during the extended hearing. Approximately two hundred exhibits were received, many of which were photographs taken during the hearing.

Because there are well-settled principles of law which are equally applicable to the questions raised by all who participated, I consider it advisable to point up these fundamentals at the outset, and to set them forth as clearly as possible in order that their application to somewhat differing factual situations may be more readily apparent.

The First Amendment to the Constitution of the United States provides, inter alia: "Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *." The Fourteenth Amendment includes the follow-

ing: " * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * " It has been held repeatedly that the latter provision has the effect of extending the guarantee of freedom of the press against congressional action to include action by state agencies as well.

Cantwell et al. v. Conn., 310 U.S. 296.

Hamilton v. Montrose, 109 Colo. 228, 124 P. (2d) 757.

I omit further reference to the first and fourteenth amendments to the Constitution of the United States for the reason that the provision of our Colorado Constitution is more inclusive in its coverage of the subject and is equally binding upon us. Any case granting relief under the guaranty of the federal constitution would be even more persuasive when considered in connection with the more specific language employed by the state constitution.

Article II, Section 10, of the Colorado Constitution provides:

"No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; * * * " (Emphasis supplied)

This limitation upon the power of state officials is applicable to those exercising authority in all three branches of the government and controls the scope of "judge made" law, as well as that emanating from legislative halls.

Crouch v. Central Labor Council, 134 Ore. 612, 293 Pac. 729.

Article II, Section 16 of the Colorado Constitution provides, inter alia, that:

"In criminal prosecutions the accused shall have the right to * * * a speedy public trial by an impartial

jury of the county or district in which the offense is alleged to have been committed."

It has repeatedly been held that the right to a "public trial" is abridged if the press is excluded.

Craig v. Harney, 331 U.S. 367.

Maryland v. Baltimore Radio Show Inc., 338 U.S. 912.

The opinion in *Craig v. Harney*, supra, contains the following significant language:

"A trial is a public event. What transpires in the court room is public property—those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it."

It is equally well established that freedom of the press is not confined to newspapers or periodicals, but is a right of wide import and "• • • in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin*, 303 U.S. 444; *Burstyn, Inc. v. Wilson*, 343 U.S. 495.

Tempering the effect of the foregoing is the oft repeated truism that "No freedoms are absolute." The freedoms of speech and press are not exceptions. No one denies the existence of broad powers inherent in the judiciary. This power unquestionably includes the right of the courts to determine the manner in which they shall operate in order to administer justice with dignity and decorum and in such manner as shall be conducive to fair and impartial trials and the ascertainment of truth uninfluenced by extraneous matters or distractions. If at any time the representatives of the "press" in any field of activity interfere with the orderly conduct of court proce-

dure, or create distractions interfering therewith, the court has the inherent power to put an immediate stop to such conduct. No claim of justification on the ground of freedom of the press would be available to those guilty of such offensive conduct.

The absolute prohibitions contained in Canon 35 of the judicial ethics have given rise to the conflict between the exercise of rights guaranteed by the Constitution and the exercise of power inherent in the judiciary. As we said in *Hamilton v. Montrose, supra*, "Here then is another case involving a conflict between liberty and authority, a conflict that is sometimes labeled 'civil rights v. police power' or 'Liberty of the individual v. the general welfare'."

The present conflict is comparable to the numerous instances in which citizens have claimed injury by alleged denial of constitutional rights resulting from restraints imposed through the exercise of the police power. The restraint will be upheld if the legislation imposing it bears a fair relation to the public health, safety, morals or welfare. *Lipset v. Davis*, 119 Colo. 335, 203 P. (2d) 730. In every case the power to regulate must not be arbitrarily imposed: it must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom. Every case involving such a conflict must be determined on its individual facts. In the instant case we must take precautionary measures to guard against two dangers: first, lest under the guise of preserving dignity and decorum in court cases the civil liberties guaranteed under the Bill of Rights be unnecessarily invaded or nullified; second, lest using the Bill of Rights as a cloak individuals are permitted "to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public," by the use of camera, radio or television in the course of a trial.

We are concerned with realities and not with conjecture. Canon 35 assumes the fact to be that use of camera, radio and television instruments must in every case interfere with the administration of justice in the particulars above mentioned. If this assumption of fact is justified, the canon should be continued and enforced. If the assumption is not justified, the canon cannot be sustained.

For six days I listened to evidence and witnessed demonstrations which proved conclusively that the assumption of facts as stated in the canon is wholly without support in reality. At least one hundred photographs were taken at various stages of the hearing which were printed and introduced as exhibits. All of them were taken without the least disturbance or interference with the proceedings, and, with one or two exceptions, without any knowledge on my part that a photograph was being taken. A newsreel camera operated for half an hour without knowledge on my part that the operation was going on. Radio microphones were not discovered by me until my attention was specifically directed to their location. Several hours were devoted to the technique involved in modern production of live telecasts and for one whole day the events taking place in the court room were produced on a closed circuit telecast and shown as they happened on the television set in the court room. Cameras used in photo and television demonstrations were of different kinds. In still photography and newsreel activity they were not noticeable and were operated in such manner that I was unaware that they were functioning. The television cameras shown were of several kinds, varying from the large, already outmoded one which is mounted on a moveable tripod, to the small one which is 4" x 5" x 7" in size. All equipment used, whether large or small, is capable of installation outside the court room with only the lens appearing on the exterior wall, through an otherwise concealed door or window, or from a booth in the rear of the court room. Only the regular lighting at all times functioning in the court room

was used, and any court room with adequate sunlight for ordinary court proceedings would require no additional lighting. There was nothing connected with the telecast which was obtrusive. The dignity or decorum of the court was not in the least disturbed. Many persons entered and retired from the court room without being aware that a live telecast was in progress. Others who took seats which were so located that they could see the television screen which was reproducing the hearing, were obviously surprised when they observed it a brief time after being seated.

I am very sure that many well meaning persons, including some leaders of the bench and bar, are of the firm conviction that some, or all, of the prohibitions contained in Canon 35 should be continued and enforced without variation. I must confess that prior to this hearing I leaned definitely toward that view insofar as television and radio were concerned. I am equally certain that the vast majority of those supporting continuance of Canon 35 have failed, neglected, or refused to expose themselves to the information, evidence, and demonstrations of progress which are available in this field. I am also satisfied that they are unfamiliar with the actual experiences and recommendations of those who have permitted supervised coverage by photographers, radio and television of various stages of court proceedings.

I do not mean to say that in every case photography, radio and television broadcasting should be permitted. There are doubtless many cases and portions thereof, which, in the court's discretion to insure justice, should be withdrawn from reproduction by photo, film, radio or television. The responsible leadership in each of these fields are in agreement that the trial court should have complete discretion to rule out all, or any part of, such activity in those instances where the proper administration of justice requires it.

Arguments and suggestions of various kinds have been submitted to me in various ways in support of the retention of Canon 35. Generally they fall into one or more of the following classifications. A brief discussion on each may be of assistance.

(1) It is claimed that permitting photographs, newsteels, radio and telecasts of court proceedings amounts to entering the field of entertainment and is not strictly within the field covered by the term "freedom of the press." The Supreme Court of the United States has held otherwise. From the opinion in *Winters v. New York*, 333 U.S. 507, I quote:

"The line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. *Hannegan v. Esquire*, 327 U.S. 146."

(2) Closely related to the foregoing is the argument that coverage of court proceedings going beyond the inaccurate word pictures painted with the pen of the court room press reporter, would be merely to satisfy "idle curiosity" for entertainment purposes. This contention overlooks the obvious fact that under our concept of government there is a constant regard for the necessity of educating and informing our people concerning the proper functioning of all three branches of government. There is no field of governmental activity concerning which the people are as poorly informed as the field occupied by the judiciary.

It is highly inconsistent to complain of the ignorance and apathy of voters and then to "close the windows of information through which they might observe and learn."

Generally only idle people, pursuing "idle curiosity" have time to visit court rooms in person. What harm could result from portraying by photo, film, radio and screen to the business, professional and rural leadership of a community, as well as to the average citizen regularly employed, the true picture of the administration of justice? Has anyone been heard to complain that the employment of photographs, radio and television upon the solemn occasion of the last presidential Inauguration or the Coronation of Elizabeth II was to satisfy an "idle curiosity"? Do we hear complaints that the employment of these modern devices of thought transmission in the pulpits of our great churches destroys the dignity of the service; that they degrade the pulpit or create misconceptions in the mind of the public? The answers are obvious. That which is carried out with dignity will not become undignified because more people may be permitted to see and hear.

(3) It is contended, usually orally and in smothered words or whispers that some trial judges, and lawyers "who are hungry for publicity, will conclude that they are actors, and by some psychological motivation, 'play to the galleries' and so conduct themselves as to satisfy their own vanity, or otherwise exploit themselves."

Any judge or lawyer who so demeans himself before a camera does not change his inherent characteristics for that particular occasion. A "show-off" or a "strutter" will be just that whether a camera is present or not. They are readily identified by any person of ordinary intelligence and are ultimately adequately and justly disposed of by the people. If a larger segment of society is permitted to witness such offensive conduct the offender will be properly judged by the people sooner than might otherwise be possible. Actual experience, however, has led to the majority view that participants in legal proceedings are far more careful in their conduct and indulge in less bickering in those cases where cameras are permitted to operate under

court supervision. Equipment employed in broadcasting, either by radio or television, is such that if any participant evidenced an intention to offend in this matter all the judge would have to do would be to press a button and the offensive conduct would be inaudible and invisible to any person except those in the court room. The capable trial judges of this state can keep full control of any such situation which might arise. It is perfectly obvious that the solution of the problem does not lie in arbitrarily forbidding the photographing or broadcasting of court proceedings. A constitutional right of all citizens cannot be denied because a very few persons may conceivably make fools of themselves before a larger audience than that which might otherwise be subjected to their offensive conduct. In the case of *People v. Hensley*, 75 Ohio St. 255, 79 N.E. 462, the court said:

"The people have the right to know what is being done in their courts, and free observation and the utmost freedom of discussion of the proceedings of public tribunals that is consistent with truth and decency, tends to the public welfare."

(4) Another argument frequently referred to during the hearings as supporting Canon 35 is that to permit photography at public trials would violate the "right of privacy" of participants or spectators. There are at least two conclusive answers to this contention:

First; One needs only to cite the law applicable to the question, which unequivocally and repeatedly has stated that when one becomes identified with an occurrence of public or general interest, he emerges from his seclusion and it is not an invasion of his "right of privacy" to publish his photograph or to otherwise give publicity to his connection with that event. The law does not recognize a right of privacy in connection with that which is inherently a public matter. Numerous cases are available on the subject and I have found no disagreement as to the law.

Berg v. Minneapolis Star & Tribune Co., 79 Fed. Sup. 957.

Metter v. Los Angeles Examiner, 35 Cal. App. (2d) 304, 95 Pac. (2d) 491.

Jacova v. So. Radio & Television Co., — Fla. —, 83 So. (2d) 34.

Jones v. Herald Post Company, 18 S.W. (2d) 972, (Ky. App. Ct.).

Humiston v. Universal Film Mfg. Co., 178 NWS 752.

Smith v. Doss, (Ala. 1948) 37 So. (2nd) 118.

Elmhurst v. Pearson, 153 F. (2d) 467.

Gautier v. Pro-Football, Inc., (1952) 107 N.E. (2d) 435.

Ettore v. Philco Television Broadcasting Corp., (D.C. Pa. 1954) 126 F. Supp. 143.

Second: To uphold Canon 35 on the ground that it prevents a violation of the individual's "right to privacy" would be to repudiate the provision of our constitution by rule of court, and to make effective the prior restraint upon freedom to publish, although the constitution expressly prohibits such restraints by clearly indicating that the remedy for abuse of the constitutional right to publish "whatever he will on any subject" is that the publisher shall be "responsible for all abuse of that liberty." How can it be contended that the prior restraint upon conduct imposed by the canon is valid when the constitution clearly indicates that the remedy for abuse of the "right of privacy" must be compensatory in its character?

(5) It also is argued that to permit photography or broadcasting of court scenes would mean that the trial judge would be confronted by innumerable persons clamoring for access to photograph and broadcast the proceedings, each attempting in a highly competitive business to

outsmart his competitors. If such a threat were to become a reality there could be little hope of maintaining order and decorum in the judicial proceedings.

The representatives of press and broadcasting interests have been alert to this situation and have taken effective steps to insure against any such debacle in this state. I can do no better than to quote from the testimony of Mr. Sheldon Peterson of the staff of K.L.Z. Radio and Television Station:

"The Court is aware, of course, that the Denver area now has 14 radio stations and 4 television stations

* * *

"The stations are thoroughly cognizant of this danger and, through a pooling arrangement, have taken positive steps to safeguard against it. To this end, they have organized a permanent association. From the membership in this association, a standing committee has been named in which is fixed full responsibility for court room broadcasts and telecasts, should they be permitted. The committee consists of Mr. Joe Herold of Station KBTB; Mr. Grady Franklin Maples of Station KGMC; Mr. William Grant of Stations KOA Radio and TV; Mr. John Bosman of Station KIMN; and Sheldon Peterson of KLZ Radio and TV. Mr. Herold and Mr. Maples are co-chairmen of the committee and Mr. Peterson is the secretary.

"Here is the way in which this association proposes to function. Whenever any of the member stations wish to cover a given trial, they will communicate with the secretary who will carry the request to the judge. Should the judge decree that radio and television coverage shall be permitted, he need deal with only one individual—that is the secretary—in laying down the ground rules for such coverage. Having reached a clear understanding where the microphones and cam-

eras shall be placed in the court room; the secretary shall then make the necessary arrangements for equipment and personnel. In all cases the Association pledges that it shall be a minimum amount of equipment. It is understood that the judge must be fully satisfied with the installation before the trial begins.

"From this basic equipment, duplicate tape recordings and film prints will be made available to all the Denver area radio and television stations that desire them. In this way, as many stations as wish may derive the benefits from the pool, yet there will be only one set of equipment for radio and one set for television. If the judge deems that live television of a trial shall be permitted, the same pooling arrangement shall prevail.

"The radio and television industries in the Denver area are highly competitive. The newsmen of these stations are fully as eager to exceed each other as are the newspaper photographers. Moreover, they are firmly convinced that under the freedoms guaranteed by the Constitution, they have the right of access to the courts with microphone and camera.

"But they are mindful, too, that the decorum of the court room must be preserved at all costs. That is why they have decided to forego the possibility of gaining competitive advantage and have agreed to cooperate through this system of pooling. Having reached this agreement, the Denver area radio and television station, through their Association, have every confidence that they can broadcast and telecast trial proceedings in a fashion thoroughly compatible with the traditional dignity of the courts."

A similar pooling arrangement has been entered into by representatives of the press photographers. This coopera-

tive effort is to be commended; but even in the absence of these formal agreements the court, in the exercise of its discretion could, and in cases of wide public interest unquestionably should, enforce similar regulations as a condition under which photographs or broadcasting of any kind would be permitted.

All of the above arguments, and others not specifically mentioned, are directed at preventing that which conjecture fears may produce an undesired result in matters wholly unrelated to the disposition of the trial thus publicized, and have nothing whatever to do with the proper determination of the issues on trial.

I have given careful consideration to the language which should be employed in a new rule which would effectively do away with the discrimination against actual pictures in favor of word pictures, and at the same time afford positive protection against interference with orderly procedure and a fair public trial. In my judgment the entire matter should be left to the discretion of the trial judge. Limitations upon that power affixed by the Supreme Court rule would leave the impression that all matters within the field not covered by the express limitations were proper subjects of reproduction by photograph or radio. I know of no limitation which should be inflexibly applied to all cases because every case involves different personalities and circumstances, all of which should be considered by the trial judge before prescribing the conditions under which radio or photography might be had.

I recommend that the following rule be adopted, effective forthwith, which shall hereafter govern trial courts in matters pertinent thereto, and that it shall supersede any rule heretofore issued in conflict therewith.

"Proceedings in court should be conducted with fitting dignity and decorum.

"Until further order of this court, if the trial judge in any court shall believe from the particular circumstances of a given case, or any portion thereof, that the taking of photographs in the court room, or the broadcasting by radio or television of court proceedings would detract from the dignity thereof, distract the witness in giving his testimony, degrade the court, or otherwise materially interfere with the achievement of a fair trial, it should not be permitted; provided, however, that no witness or juror in attendance under subpoena or order of the court shall be photographed or have his testimony broadcast over his expressed objection; and provided further that under no circumstances shall any court proceeding be photographed or broadcast by any person without first having obtained permission from the trial judge to do so, and then only under such regulations as shall be prescribed by him."

The broad discretion thus given the trial court affords ample protection against abuses of the constitutional right of freedom of the press, and will lead to a cooperative effort as between the judiciary and the press to protect, preserve, and portray the judicial process upon the level of justice to which it actually attains.

In connection with the canons other than the one dealing with court room photography and broadcasting, I have determined that no good purpose would be served in conducting further hearings on the question as to whether this court should amend or vacate the order entered on July 30, 1953, by which the canons of professional and judicial ethics were "adopted." I am sure that any possible controversy arising under these canons can be properly resolved by a clarification of the intent of the court in "adopting" the canons, and by a definite statement concerning their applicability to disciplinary proceedings instituted under the provisions of chapter 20, R.C.P. Colo.

By the "adoption" or "approval" of the canons of ethics the court did *not* intend to give them the force or effect of law. "Adoption" of the canons of ethics by the court was *not* intended to enlarge, or narrow, the field of conduct within which disciplinary actions would be warranted. It was *not* the intention of the court in expressing approval of these ethical standards to give the broad statements therein contained the effect of a "rule of court" enforceable as such. It *was* the intention of the court to recommend the canons of ethics as a wholesome standard of conduct, as a statement of general principles best calculated to reflect credit upon the profession, to bestow dignity and poise upon the court, and repose confidence and faith in the people concerning the administration of justice. Rules for conduct suggested in those canons which do not recognize the distinction between that which is inherently wrong and inherently right, or that which is basically immoral and basically moral, or that which is fundamentally dishonest and fundamentally honest, cannot subject any person to disciplinary action because of the existence of the canon unless he was subject to such discipline in the absence of the canon. Although the canons employing language of wide coverage cannot be given the effect of law, they nevertheless are recognized generally as a system of principles of exemplary conduct and good character.

No one could reasonably contend that for each deviation from the broad generalities expressed in the canons of ethics, which recently have been given strained construction or have been used for ulterior purposes, a person departing therefrom should be subjected to discipline or unwarranted publicity when his conduct involves no element of inherent wrong, immorality or dishonesty.

Our Court has held, with reference to the practice of medicine which is another of the first recognized "learned professions", that the legislature under guise of the exercise of the police power could not provide for revocation

of a physician's license "for the mere breach of ethics not involving moral turpitude or dishonorable conduct." *Lipset v. Davis*, 119 Colo. 335, 203 P. (2d) 730. Likewise we consider that this Court is without power to discipline attorneys for reasons other than those involving conduct which is inherently wrong, immoral or dishonest.

I am confident that our intention at the time of the "adoption" of the canons was, and now is, to approve them as a statement of high standards of conduct recommended to the bar and the bench as being best calculated, if substantially adhered to, to command and hold respect for the judicial processes of the land.

As limited by the foregoing, I see no valid reason why our former approval of the canons should be vacated or withdrawn.

Respectfully submitted this 20th day of February, 1956.

/s/ O. OTTO MOORE

O. Otto Moore

Referee

On this 27th day of February, 1956, the Court, sitting en banc, approves and adopts the report of the referee and directs its publication in the official reports of this Court.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

NO. 256

BILLIE SOL ESTES,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

**ON WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF TEXAS**

BRIEF FOR RESPONDENT

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IN THE
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OCTOBER TERM, 1964

NO. 256

BILLIE SOL ESTES,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

ON WRIT OF CERTIORARI TO THE COURT
OF CRIMINAL APPEALS OF TEXAS

BRIEF OF THE RESPONDENT
TO THE HONORABLE SUPREME COURT OF
THE UNITED STATES:

QUESTIONS PRESENTED

The questions presented for review and which will be discussed in this brief are:

1. Does the introduction of television into a State criminal trial, over the defendant's objection, *per se* violate the due process of law provision of the Fourteenth Amendment?

2. Does petitioner show that the trial court's limited and controlled admission of television during petitioner's trial denied him a fair trial in violation of the Fourteenth Amendment?

3. Does Canon 35 of the Canons of Judicial Ethics of the American Bar Association constitute a rule of trial procedure binding on a State court?

STATEMENT OF THE CASE

Petitioner's statement of the case is considered inadequate. In view of repeated generalizations in petitioner's brief which are not descriptive of the conditions under which some of the proceedings of petitioner's trial were televised, respondent desires to submit the following statement:

The facts and circumstances under which televising of a part of the proceedings were permitted by the trial court are not in dispute. The broad claims and charges made by petitioner in his Bill of Exceptions No. 5 (R. 8-18) were drastically qualified by the trial judge. These qualifications are set forth on pages 18 to 21 of the record. It is particularly significant that petitioner agreed to these qualifications and accepted them (R. 21). Again in petitioner's Bill of Exceptions No. 6 numerous claims and charges were asserted by petitioner's counsel (R. 22-24) which also were drastically qualified by the trial judge (R. 25). Again the petitioner agreed to these qualifications and accepted them (R. 25). Thus, these qualifications of the trial court, accepted and agreed to by petitioner, constitute the facts of how this limited use of television during the trial was conducted. These facts are set forth on pages 19, 20 and 21 of the record and again on page 25 of the record. Summarized they show:

The hearing held on September 24 and 25, 1962, to determine whether telecasting, broadcasting and press photography would be permitted took place in part in the absence of the defendant and before the cause was called for trial (R. 21). This was telecast live. Follow-

ing the call of the case, the jury venire was called, sworn and continued (R. 57). The cause was passed for absent witnesses (R. 123).

No evidence or arguments were adduced at the September 24 and 25 hearing concerning the merits of the case. On October 22, Mr. Hume Cofer, attorney for petitioner, testified that the prospective jurors could not have learned anything "... about the facts, nor any of the evidence" of the case from the prior live televising (R. 63).

The use of live telecasting, radio broadcasting and press photography that obtained during the hearing on "petitioner's motion not to allow telecasting, broadcasting and press photography" and his motion for continuance, was not permitted to the same extent when the actual trial began a month later (R. 19-21).

Prior to the trial, a booth was constructed in the rear of the courtroom, painted the same or near the same color as the courtroom, with a small opening across the top of the booth for the use of cameras (R. 19).

Live telecasting was not permitted prior to the return of the verdict except for arguments to the jury by state's counsel, and the only other telecasting was on film without sound. Live broadcasting of the trial by radio was not permitted (R. 25).

The telecasting on film was not a continuous operation but was done only at intervals for use on newscasts (R. 20).

Only noiseless cameras were permitted by the court. Floodlights and flashbulbs were not allowed in the courtroom. Telecasting or photographing in the hallways leading into the courtroom or on the floor where the courtroom was situated were not permitted (R. 20).

The court permitted live telecasting only of the arguments of state's counsel. The arguments of petitioner's attorneys were not telecast or broadcast in line with their request (R. 20).

There was no televising at any time during the trial except from the booth in the rear of the courtroom. There was no radio broadcasting equipment in the courtroom at any time (R. 20).

There was no request by any witness that he not be televised while testifying (R. 21).

There was no request by any juror either while being interrogated on voir dire or at any other time that he not be televised (R. 21). Live radio broadcasting or television was not permitted during the voir dire of the jury or during the taking of any testimony (R. 25).

Petitioner did not take the stand to testify in his own behalf. Petitioner called no witness to testify on his behalf (R. 137).

In accordance with the requirements of Texas statutes the jury was kept together throughout the trial and permitted no contact with the outside world. When not in the courtroom or partaking of meals, the jury was locked up.

SUMMARY OF ARGUMENT

In presenting its summary of argument respondent cannot improve upon the interpretation and effect the American Bar Association itself gave to its Canon of Judicial Ethics 35 when amended in its present form at the mid-winter meeting of the House of Delegates of the American Bar Association in 1963. This was the last time that the American Bar Association, through its House of Delegates, officially dealt with Canon 35.

By resolution adopted by the House of Delegates on February 5, 1968, the American Bar Association solemnly declared that the purpose and objective of Canon 35, along with the other canons of judicial ethics

"... constitute the standards of policy recommended by the American Bar Association for the consideration and *voluntary*¹ guidance of the rule-making authorities of the *states* of the United States, and have the force of law only where *voluntarily* adopted and incorporated in *state laws* or as a rule of court. We recommend that the rule-making authority of each *state* exercise the *exclusive responsibility* of adopting Canons of Ethics in the interest of state-wide uniformity, and avoidance of confusion and pressures that have resulted in some jurisdictions where magistrates or judges have individually adopted rules concerning the conduct of their courts."²

The use of television in the courtroom is not *per se* a violation of the rights guaranteed a defendant under the Fourteenth Amendment. Television could be so used as to affect the defendant's rights to a fair trial. Similarly, the conduct of spectators or that of members of the press could be such as to violate these rights.

To equate Canon 35 with the due process clause of the Fourteenth Amendment would lead to a series of legal absurdities.

The limited use of television under close supervision and direction of the court, with cameras in the back of the courtroom in a booth and hidden from view, with no operating sounds to be heard or seen, did not adversely affect petitioner's right to a fair trial.

¹Emphasis and parentheses are respondent's unless otherwise indicated.

²88 A.B.A. Rep. 118 (1963).

There is no showing that the use of television during the trial of petitioner precluded him from having a fair trial and in absence of such a showing, petitioner's claim of denial of due process of the law must fail.

The answer to the problem of televising trials lies not in barring all television cameras from the courtroom, rather the answer lies in the same judicious and sensible rule now applied to trials covered by the press and open to spectators. In instances where the rights of the accused could be affected by the presence either of television, radio, the press or spectators, the court should take such action as will accord the defendant due process.

The procedure of a State court does not violate the Fourteenth Amendment "because another method may seem fairer or wiser or give a surer promise of protection to a prisoner".

The public not only has the right to know, it should know what goes on in the courtroom. Television cameras used in the courtroom under the same limitations as were prescribed by the court in the case at bar enlighten and educate the public and comport with "the demands of a democratic society that the public should know what goes on in courts."

ARGUMENT

I. THE TELEVISING OF A PART OF A CRIMINAL TRIAL DOES NOT CONSTITUTE *PER SE* A DENIAL OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

The American Bar Association, when it last considered and amended Canon 35, regarded this Canon as no more than a recommendation for the voluntary guidance of the rule-making authorities of the states.

The claims and contentions now asserted in petitioner's brief³ and more particularly in the brief of *amicus* American Bar Association are strikingly different from the sound approach declared by the American Bar Association House of Delegates,⁴ on the recommendation of its Special Committee on Canon 35 on the last occasion Canon 35 was officially considered by the American Bar Association. At that session—the mid-year meeting of the American Bar Association in 1963—Canon 35 received its last amending. Immediately following the passage of Canon 35 in its present amended form, the House of Delegates discussed and passed the resolution set out below. Both the distinguished gentlemen who constituted this Committee and the House of Delegates of the American Bar Association—the governing body—then recognized as sound the very principles for which respondent here contends. The resolution will be quoted in full, inasmuch as neither the petitioner's brief nor that of *amicus* American Bar Association gives it any recognition:

“The Canons of Professional Ethics and the Canons of Judicial Ethics, as adopted by the American Bar Association, constitute the standards of policy recommended by the American Bar Association for the consideration and *voluntary guidance of the rule-making authorities of the states of the United States, and have the force of law only where voluntarily adopted and incorporated in state laws or as a rule of court.* We recommend that the rule-making authority of each state exer-

³Petitioner gives credit to distinguished members of the American Bar Association's Special Committee on Canon 35 for assistance in the preparation of petitioner's brief. See, for instance, footnote 17 of petitioner's brief.

⁴We are told in the brief of *amicus* American Bar Association that the House of Delegates is the governing body of the American Bar Association. See footnote, page 3, brief of *amicus* American Bar Association.

cise the *exclusive responsibility* of adopting Canons of Ethics in the interest of state-wide uniformity, and avoidance of confusion and pressures that have resulted in some jurisdictions where magistrates or judges have individually adopted rules concerning the conduct of their courts." 88 A.B.A. Rep. 118 (1963).

After approving and adopting this resolution the House of Delegates noted that this Special Committee, "its business being completed, was then discharged by vote of the House."

What the American Bar Association officially decided in February of 1963 (after the trial of the case at bar) and what it is contending for in its *amicus* brief is in striking discord, to say the least. Respondent respectfully submits that the Association's official recognition that Canon 35 existed solely "for the *voluntary* guidance of the rule-making authorities of the states" is right; that the Association's official recognition that Canon 35 should have "the force of law only where *voluntarily* adopted and incorporated in state laws or as a rule of court" is right; that the Association's official view that the state should exercise "the exclusive responsibility" as to this Canon is right; that the contention of eminent counsel for *amicus curiae* American Bar Association that Canon 35 constitutes fundamental constitutional requirements is wrong.

The Evolution of the Present Judicial Canon 35

The American Bar Association's original Canon 35 was adopted on September 30, 1937, by the House of Delegates. It provided:

⁵See Official Report, proceedings of House of Delegates, 1963 mid-year meeting, 88 A.B.A. Rep. 118.

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." 62 A.B.A. Rep. 1134-35 (1937).

Let it be noted that this Canon stresses the dignity and decorum with which court proceedings are to be conducted. It points out that the taking of photographs and the broadcasting of court proceedings are calculated (1) to detract from the "essential *dignity* of the proceedings," (2) "degrade the court" and (3) "create misconceptions with respect thereto in the mind of the public".

This Canon remained unchanged for 15 years. It is significant to observe that throughout this 15 year period of the existence of the original Canon 35 the American Bar Association believed that the evil of photographing and broadcasting of court proceedings consisted of (a) its indignity, (b) its degrading of the court and (c) in the "misconceptions with respect thereto in the mind of the public". Over these 15 years it had not been contended by the learned gentlemen serving the American Bar Association Committees and its House of Delegates that the photographing and broadcasting of court proceedings in a criminal case would result in the denial of a fair trial.

The first amendment to Canon 35 came in 1952—15 years after the original adoption of the Canon. It specifically included "televising" as being undignified, along with photographing and broadcasting, and emphasized that such proceedings were degrading to the court. For the first time the amended Canon suggested

that the taking of photographs and the broadcasting or televising of court proceedings are *calculated* "to detract the witness in giving his testimony" but it is clear that the emphasis still remained on the indignity of the proceedings and its degrading nature. Unfairness to the defendant was not mentioned.

The last amendment to Canon 35 was promulgated *after* the case at bar was tried. It represents the ultimate its sponsors could conceive to be evil in photography, broadcasting and televising. It was adopted after televising of court proceedings had been tried and tested. This second amended Canon still emphasizes the chief complaint to be that such proceedings are undignified. What is of paramount significance however is that this last amended Canon abandons the claim that photography, broadcasting and televising "degrade the court". Thus, after experimenting with its Canon from 1937 to 1963—a period of 26 years—the American Bar Association realized and admitted its error and conceded that photography, broadcasting and televising were not degrading to the court. But the architects of the last amendment, in an effort to give the Canon more far reaching effect, declared that the taking of photographs in the courtroom and the broadcasting or televising of court proceedings "distract participants and witnesses in giving testimony". This amendment is only two years old. After the passage of a little time and after a period of unbiased and unemotional observation, this last amendment may well meet the fate of the solemn declaration, oft-repeated for 26 years, that photography, broadcasting and televising proceedings were degrading to the court.

The stature of Canon 35 is not enhanced by its declaration that the televising of court proceedings "create misconceptions with respect thereto in the mind of

the public". What misconceptions? By bringing to the public an accurate portrayal of what goes on in the courtroom?

Canon 35, as is so clearly demonstrated by its history, was designed to preserve dignity and decorum in the courtroom. Whatever has been added to buttress it is mostly window dressing. That the dignity of a court proceeding should be at all times observed and preserved is readily conceded. It is also conceded that the manner and method of televising such proceedings could become quite undignified. But it is denied that the mere presence of a camera, unobtrusively located, recording silently some of the proceedings, necessarily results in an undignified trial. It is denied with even greater conviction that such an event *ipso facto* denies a defendant a fair trial.

Notwithstanding efforts to undergird Canon 35 with two amendments, neither the Committee authors nor the House of Delegates adopting it have made the bold claim that *any* act of televising in the courtroom over the objection of the accused *per se* constitutes a denial of due process. Yet this is the present claim of petitioner and *amicus* American Bar Association. To carry this contention to its logical conclusion would mean the end of our present system of public trials, as is demonstrated elsewhere in this brief.

What petitioner and *amicus* American Bar Association are in effect seeking is the inclusion of Judicial Canon 35 in the United States Constitution. They are not content to let it remain a Canon of Ethics; they aspire to exalt it to the status of a constitutional amendment. They do not heed the admonition of Mr. Justice Sutherland in *W. B. Worthen v. Thomas*, 292 U.S. 426, 435 (1934), "The power of this court is not to amend but only to expound the Constitution as an agency of

the sovereign people who made it and who alone have authority to alter or unmake it."

The Absurdities That Follow if Canon 35 is to be Equated with the Fourteenth Amendment

Petitioner and *amici* who side with him take the unequivocal position that any violation of Canon 35, no matter how slight, deprives the defendant of his constitutional rights to a fair trial. Presumably they are driven to this position as there is nothing in the record to show that any witness or participant was disturbed or distracted by the televising that occurred in the case at bar. There is nothing in the record to disclose that the fairness of the defendant's trial was affected in the slightest, unless it is to be *presumed* that the very act of televising denied him a fair trial. For such a rule to be adopted would give rise to a series of absurdities, some of which we will note.

Canon 35 draws no distinction between photography, broadcasting and televising. It condemns all three activities in the same manner and to the same degree.

If this Honorable Court embraces the rule here contended for by petitioner and the *amici* who side with him, to be consistent it will have to hold that a denial of fair trial has resulted in each of the following situations:

1. A photographer in the rear of the courtroom with a small camera unnoticed by the judge, court attendants, witnesses or participants takes a few shots of the proceedings during the trial. The defendant is

*See for instance, the argument of *amicus* American Bar Association under point III, page 23 of its brief, where it is asserted that Judicial Canon 35 reflects a constitutional requirement stemming from the fair trial guarantee of the Fourteenth Amendment.

convicted. On motion for a new trial he produces proof of the taking of these pictures. Has he been denied a fair trial and is he entitled to a new trial? Under the urging of *amicus* American Bar Association he has indeed been denied a fair trial because it argues that Canon 35 reflects a fundamental constitutional requirement⁷ and Canon 35 condemns the "taking of photographs in the courtroom, during sessions of the court".

2. The Canon similarly condemns the taking of photographs during "recesses between sessions" because they detract from the dignity of the proceedings and "distract participants and witnesses in giving testimony". During a recess a witness on the stand leaves the courtroom and walks to the water fountain. While drinking from the fountain the photographer takes a picture without flash which may or may not have been noticed by the witness. The defendant is convicted. Is he entitled to a new trial? If not, what becomes of the American Bar Association argument that this Canon reflects a fundamental constitutional requirement, one of which is that no photographs be taken during recess?

3. The court permits the broadcasting of his charge to the jury by use of a microphone either in plain view or hidden from view. Canon 35 condemns it. Under the contention of the American Bar Association, if consistency is to be observed, the defendant upon conviction is entitled to a new trial. It is inconceivable to us how this act of broadcasting of the charge to the jury affected the fairness of his trial.

4. A camera in the rear of the courtroom hidden from view televises only the taking of the oath of each witness as he takes the stand. Canon 35 condemns it. Under the American Bar Association argument the de-

⁷A.B.A. brief, p. 23.

fendant's constitutional rights have been violated. But just how this affected the fairness of the defendant's trial is quite unclear to us.

These illustrations can be multiplied. They are submitted not to ridicule but to point up the fallacy in the contention that any act of photography or broadcasting or televising in violation of Canon 35 *ipso facto* transgresses the defendant's constitutional rights. Therein lies the weakness of petitioner's contention. There is not the slightest showing that the partial televising of petitioner's trial resulted in any actual denial of due process. The court is being asked to presume something that did not exist.

The problem can only be resolved by a requirement that before relief is granted the circumstances of the acts of photography or broadcasting or televising must be such as to have in fact rendered the trial unfair.⁸ Otherwise the application of the Fourteenth Amendment to televised court proceedings will produce farcical results.

Alleged Distractions to Witnesses and Participants

That the mere recording of testimony and its dissemination to the public constitutes a "distraction" to a witness, a defendant or to counsel furnishes no valid support to barring the television camera. Most court proceedings are now recorded by the official court reporter using a machine which records the voice of witness, counsel and judge and is operated in their plain view. In former days, a court reporter seated directly in front of the witness recorded his testimony

⁸"[B]ut fairness is a relative, not an absolute concept. It is fairness with reference to particular conditions or particular results." Mr. Justice Cardozo—*Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934).

in shorthand. Both methods are used in many courtrooms. Under either method, the news media can buy this testimony from the court reporter and make it public. Is this a psychological distraction to the witness? Is this an embarrassment to the defendant affecting his rights under the Fourteenth Amendment? Is this an annoyance to a supersensitive counsel? This recording machine, in plain view of witness, defendant and counsel, is much more noticeable than was the silent, obscured TV cameras in the back of the courtroom during the trial of the case at bar.

The "distraction" argument, if it is to be applied consistently, would mean an end to all news coverage of trials. A trial of great public interest may draw a dozen or more members of the press. Seated at a special table with pencils poised in hand, they concentrate on every word of the witness' testimony and busily record it. Who is there to say that this is a lesser "distraction" than the hidden TV camera in the rear of the courtroom?

The presence of rows of spectators in the courtroom with eyes glued on the witness undoubtedly provide some "distraction". To many defendants the presence of spectators is embarrassing. These conditions are not ideal from the standpoint of providing a perfect setting for the defendant, but is it to be decreed that our entire interest in the administration of justice is to be centered on the defendant?

If all distractions to witnesses and participants are to be removed to assure a "fair trial", public trials are doomed. For so long as trials are to be open to the public and the press—there will be some inevitable distractions. But is this not a lesser evil than the oppression that will follow when trials are privately held? For as Mr. Justice Sutherland pointed out—"To allow

it (the press) to be fettered is to fetter ourselves.” *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936).

II. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

Petitioner makes no showing of denial of due process of law.

The burden is on the petitioner to show such prejudice or partiality in the trial as to “necessarily prevent a fair trial”. *Lisenba v. California*, 314 U.S. 219, 236 (1941); *Beck v. Washington*, 369 U.S. 541 (1962). As Mr. Justice Holmes concluded, in a case wherein some jurors actually had read news articles of the case during the trial, “If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain a jury trial under the conditions of the present day.” *Holt v. United States*, 218 U.S. 245, 251 (1910).

The briefs of petitioner and *amici* who take his side literally teem with claims of adverse psychological effect television has on witness and participant. The genuine psychologists still are to be heard from. The views so far expressed are merely the opinions of men untrained in this scientific field. But, this Honorable Court is not dealing in hypothetical situations, rather it has before it a factual situation bearing no reasonable resemblance to the assumptions engaged in by petitioner.

The record clearly discloses (in fact, petitioner agreed to the facts stated in the qualification of the Presiding Judge to petitioner’s Bills of Exception, R. 18-21, 25) that, far from commotion and disturb-

ance, confusion and annoyance, the partial televising of the trial was conducted under these circumstances:

(1) The cameras were in a remote place in the rear of the courtroom, hidden from view of those in attendance at the trial.

(2) The defendant offered no testimony, thus there could have been no distraction of the defendant or defendant's witness.

(3) The defendant's counsel preferred to make his argument to the jury without being televised and his request was granted.

(4) Telecasting only on film *without sound* was permitted except at the time the state's counsel made his argument to the jury, the return of the verdict by the jury and its acceptance by the court, which were telecast with sound.

There is not the slightest showing in the record that any witness was inhibited or that any juror was affected by this televising, nor was there any showing that the defendant was prevented from the full opportunities of a fair trial by the presence of the hidden TV cameras which recorded only a part of the proceeding. The court is asked to *presume* as a matter of law that the defendant's rights were adversely affected. This not only is a novel approach to the question of a fair trial—it is a dangerous one.

The procedure of a State Court does not violate the Fourteenth Amendment "because another method may seem fairer or wiser or give a surer promise of protection to a prisoner".

In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), the State of Massachusetts approved the practice of permitting a jury to view the scene of the crime in the

absence of the defendant. This the defendant contended denied him due process. This Honorable Court rejected the contention and held:

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. * * * Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar." 291 U.S. at 105.

This holding was reviewed in *Leland v. Oregon*, 343 U.S. 790 (1952). Oregon law provided that "morbid propensity" to commit a crime was no defense and the burden was cast on the defendant to prove his defense of insanity "beyond a reasonable doubt". The court, speaking through Mr. Justice Clark, held:

"Nor is this a case in which it is sought to enforce against the states a right which we have held to be secured to defendants in federal courts by the Bill of Rights. In *Davis v. United States* (US) supra, we adopted a rule of procedure for the federal courts which is contrary to that of Oregon. But '[i]ts procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.' *Snyder v. Massachusetts*, supra (291 US at 105, 78 L ed 677, 54 S Ct 330, 90 ALR 575). 'The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. . . . An important safeguard against such merely individual judgment is an alert deference to the

judgment of the state court under review.' Mr. Justice Frankfurter, concurring in *Malinski v. New York*, 324 US 401, 417, 89 L ed 1029, 1039, 65 S Ct 781 (1945). We are therefore reluctant to interfere with Oregon's determination of its policy with respect to the burden of proof on the issue of sanity since we cannot say that policy violates generally accepted concepts of basic standards of justice." 343 U.S. at 798-799.

As pointed out, *supra*, in 1963 *amici* American Bar Association recognized the wisdom of this rule of law when it forthrightly declared by resolution adopted by its House of Delegates that Canon 35 was merely recommended "for the consideration and voluntary guidance of the rule-making authorities of the states of the United States, and have the force of law only where voluntarily adopted and incorporated in state laws or as a rule of court".

The jurisprudence of our land will be best served, respondent submits, by this Honorable Court following the action of the House of Delegates, carefully and studiously taken at its mid-year session in 1963, instead of adopting the extreme rule called for in the Association's *amicus curiae* brief—that Canon 35 reflects a "constitutional requirement".

The established rule of procedure in Texas has always been that it is within the sound discretion of the trial judge to determine whether television or photography of a trial or any part thereof would be permitted. This rule of procedure recognizes that each factual situation must rest on its own bottom. As to whether such televising or photography has in fact denied the defendant due process of law must be determined by an examination of the facts of the case—just as it

⁹88 A.B.A. Rep. 118 (1963).

would be done if unruly spectators interrupted the trial or members of the press engaged in conduct alleged to be prejudicial to the defendant's rights.

The Fair and Reasonable Approach to Courtroom Televising

Respondent detects an unmistakable hysteria in the clamor to ban all televising of court proceedings as required by Judicial Canon 35 which means, for instance, that not even one scene could be recorded by a camera that is completely hidden from view without violating the accused's constitutional rights. It would mean that in cases of pleas of guilty where neither witness nor accused testifies the camera would still be banned. And on what ground? That it is "undignified"? Is the Fourteenth Amendment to be stretched and tortured to make it applicable to an "undignified" event in the courtroom? Is this not carrying the due process contention—the "fair trial" argument—to an absurdity? The answer lies in the warning of Mr. Justice Holmes, "I cannot believe that the (Fourteenth) Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions." *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930). Here the petitioner and *amici* seek to embody in the Fourteenth Amendment the "ethical" beliefs of a bar association.

We respectfully suggest that the fair and reasonable approach to this problem is not one of letting the pendulum swing to an absurd and dangerous arc. The approach should be independent of emotional and imaginary fears. Fair to the defendant, it should not be unfair to the public and the news media. Loud and demanding cries for reform need to be viewed with particular care, lest a result be reached which as Mr.

Justice Story described it, made "shipwrecks of the law".¹⁰

The answer to the problem of televising trials lies not in barring all cameras from the courtroom. It lies not in making Canon 35 sacrosanct to the point of holding that the mere transmission of one scene by the TV camera in the courtroom without the consent of the accused renders the proceeding *ipso facto* unconstitutional. Rather the answer lies in the same judicious, sensible rule now applied to trials covered by the press and open to spectators. Members of the press could be guilty of conduct during the trial that would keep the defendant from having a fair trial. If this occurred, the court should take appropriate steps to guarantee a fair trial. Spectators could so demean themselves as to keep the defendant from having a fair trial. If this occurred, the defendant should be accorded the protection of the court to assure a fair trial. But to unqualifiedly say that because the press or spectators, as the case may be, *could* be guilty of conduct that denied the accused due process of law is grounds for excluding them from the trial is poor argument indeed. By the same yardstick, simply because television *could* create conditions denying the accused due process of law is poor argument for excluding it from all criminal trials on constitutional grounds.

In the final analysis, the responsibility for assuring the accused a fair trial remains with the presiding Judge. It is his responsibility to keep the press under reasonable control, to keep spectators under reasonable control and similarly he should exercise the responsibility of keeping television efforts under appropriate control.

¹⁰Story: Misc. Writings, 283.

III. THE PUBLIC NOT ONLY HAS THE RIGHT TO KNOW—IT SHOULD KNOW WHAT GOES ON IN OUR COURTS

In *Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950), this Honorable Court declared:

"... One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.
* * *" 338 U.S. at 920.

If the public should know what goes on in our courts—as this Honorable Court has said it should—then how much better, clearer and more accurately can it be told by television than by any other media.

Respondent does not find it necessary to contend that the provisions of the Sixth Amendment guaranteeing a public trial are for the benefit of the public but respondent does assert that proceedings in the courtroom are public property.

In *Craig v. Harney*, 331 U.S. 367 (1947), this Honorable Court pointedly said: "What transpires in the courtroom is public property." 331 U.S. at 374. The court further noted that

"... There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in in proceedings before it." 331 U.S. at 374.

In *Re Oliver*, 333 U.S. 257 (1948), this court emphasized:

"... Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has

always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. *The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . .*" 333 U.S. at 270.

Mr. Justice Brennan in *Levine v. United States*, 362 U.S. 610 (1960), in a dissenting opinion joined in by Mr. Justice Douglas, observed that "The special interest of the public in the publicity of adjudications of guilt of crime has been repeatedly pointed out judicially." 362 U.S. at 626. Indeed the public does have a special interest in such publicity and when this interest ceases the administration of justice is sure to suffer.

It was stated by this Court in *Pennekamp v. Florida*, 328 U.S. 331 (1946), that:

"Free discussion of the problems of society is a cardinal principle of Americanism—a principle which all are zealous to preserve. Discussion that follows the termination of a case may be inadequate to emphasize the danger to public welfare of supposedly wrongful judicial conduct." 328 U.S. at 346.

Respondent is aware of the views expressed by Mr. Justice Douglas which are reproduced in the American Bar Association Journal of August 1960.¹¹ After noting that "What transpires in the courtroom is, of course, public property in the sense that what happens may be reported and discussed", Mr. Justice Douglas stated that "the historic concept of a public trial envisaged a small close gathering, not a city-wide, state-wide or nation-wide arena". If this means that it is

¹¹46 A.B.A.J. 840, 842.

considered preferable to the administration of justice for only a small number instead of many to witness our court trials, respondent respectfully and with deference disagrees.

Although respondent regards it unnecessary to this case to engage in a discussion of the pros and cons of the desirability of televising court proceedings, we cannot refrain from pointing out that the advent of television provided the first opportunity for the public at large to know what transpires in the courtroom. Therefore, the limitations on seating capacity reduced this opportunity. Far from viewing a trial as a spectacle, the solemnity, dignity and fairness of a properly conducted trial would prove enlightening to the public and promote a greater respect for our courts. Respondent readily admits that a poorly conducted trial would have the opposite effect, but there the evil rests not with television but with the failure of the Bench and Bar to keep their house in order.

Of all of the media of information, none portrays the courtroom scene, the spoken word and the appearance of the participants so accurately as the television camera. There is no chance for mistake or erroneous interpretation. Still, paradoxically, the American Bar Association's Canon 35 refers to such a transmission of information as creating "misconceptions * * * in the mind of the public".

Two well-reasoned cases by State Courts which discuss and discard the various arguments advanced by petitioner and amici who take his side are: *Lyles v. State*, 330 P. 2d 734 (Okla. Cr., 1958); *In Re Hearings Concerning Canon 35*, 296 P. 2d 465 (S. Ct., Colo., 1956). We commend them for the consideration of this Honorable Court.

Television's Alleged Influence on Jurors

Pages 12 and 13 of the *amicus curiae* brief of the American Bar Association are devoted to a hypothetical discussion of the impact of television on jurors. The brief discusses the influence of a wife on her juror husband, the impact of witnessing repeated trial episodes on the television screen and other supposedly inhibiting effects produced by jurors looking at themselves on the television screen. But this is purely an academic discussion. Under the laws of Texas, the jurors in the case at bar were required to be locked up together and excluded from outsiders. (Articles 623, 668, 670 and 671, Code of Criminal Procedure of Texas.)¹²

In response to Petitioner's argument Respondent has obtained the affidavit of each juror in the case at bar and has furnished a copy of same to counsel for Petitioner. These affidavits are available should the Court desire to know the impressions that were produced on the minds of the jurors in this case because of the presence of the cameras in the courtroom and are hereby tendered to the Court.

¹²Articles Appear In Appendix.

CONCLUSION

It is respectfully submitted, for the reasons stated above, that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

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APPENDIX

The following four articles are from the Code of Criminal Procedure of Texas:

Art. 623. 699, 680 Jurors shall not separate

"The Court may adjourn veniremen to any day of the term. In felony cases when jurors have been sworn in a case, those so sworn shall be kept together and not permitted to separate until a verdict has been rendered or the jury finally discharged; provided, however, that when such jurors are kept overnight, facilities shall be provided for female jurors separate and apart from the facilities provided for male jurors, and such juries shall be permitted to separate to the extent of housing female jurors separate and apart from the male jurors."

Art. 668. 745, 725 Separation of jury

"After the jury has been sworn and impaneled to try any felony case, they shall not be permitted to separate until they have returned a verdict, unless by permission of the court, with the consent of the attorney representing the State and the defendant, and in charge of an officer."

Art. 670. 747, 727 To provide jury room

"The sheriff shall provide a suitable room for the deliberation of the jury and supply them with such necessary food and lodging as he can obtain. No intoxicating liquor shall be furnished them. In all cases wherein a jury consists partly of male jurors and partly of female jurors, the sheriff shall provide facilities for the female jurors separate and apart from the facilities provided for the male jurors."

Art. 671. 748, 728 Conversing with jury

"No person shall be permitted to be with a jury while they are deliberating upon a case, nor be permitted to converse with a juror after he has been impaneled, except in the presence and by the permission of the court, or except in a case of misdemeanor where the jury have been permitted by the court to separate. No person shall be permitted to converse with the juror about the case on trial."

Office Supreme Court, U.S.

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SUPREME COURT OF THE UNITED STATES

October Term, 1964

No. 256

Billie Sol Estes,

Petitioner,

v.

The State of Texas,

Respondent.

On Writ of Certiorari to the Court of
Criminal Appeals of Texas

Proceedings Relative to Petition for
Rehearing by the State of Texas

BRIEF OF THE STATE BAR OF TEXAS AS AMICUS CURIAE

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\ Duke W. Dunbar, Attorney General of Colorado,
acting on behalf of the Supreme Court of Colorado,
joins in this brief urging that the Court grant Re-
hearing.

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BRIEF OF THE STATE BAR OF TEXAS AS AMICUS CURIAE

This *amicus curiae* brief urging Rehearing is filed pursuant to Rule 42 (4) of the Rules of the Supreme Court which dispenses with the requirement of consent by the parties to the case.

Interest of the State Bar of Texas as Amicus Curiae

The interest of the State Bar continues to be that which prompted the filing of our *amicus curiae* brief on original submission of this case. The decision of the Court is incompatible with an expressed policy of

the Judicial Section of the State Bar of Texas. Our conviction that the decision is based on considerations not properly before the Court again compels the expression of our view.

Argument

The question presented to the Court by this case in truth lies in an "unplowed field." Yet spreading salt upon the field will not stimulate the growth of information required for an intelligent appraisal of all factors bearing on the question. To speak of reassessment of the question of televised trials in the light of future refinements in the art or with respect to the impact of television on less notorious trials overlooks what is almost a certainty. That is, the Court ruling as it now stands means that these cases will not arise, much less come before this Court. This decision is a constitutional stifling of an issue which effectively precludes further meaningful inquiry as to whether the stifling continues to be necessary or even whether it is currently necessary.

The crux of the Court's decision is its comparison of the *Estes* case with several others, notably *Rideau v. Louisiana*, 373 U.S. 723 (1963). It is stated in the opinion of the Court that

"(t)he facts in this case demonstrate clearly the necessity for the application of the rule announced in *Rideau*. (opinion, p. 17)

Analysis reveals, however, that comparisons of *Rideau* and *Estes* are inapposite, and we suggest that re-examination of the decision of the Court is in order

I.

On occasion the Court has set aside state court

convictions as violating the due process clause of the Fourteenth Amendment even absent any showing of isolatable prejudice. However, each occasion has involved the occurrence of an *event* which was presumed to be a meaningful substitute for a showing of isolatable prejudice. The *events* which will support this presumption of unfairness in the trial have been carefully circumscribed by considerations of legal history and experience. These *events*, which have been expressed as basic constitutional rights, have achieved recognition through the evolution of the Anglo-American legal system and the concurrent perception of certain well-known traits of human behavior. The long and deliberate history which has shaped these basic rights is well summarized in Part II of the concurring opinion of the Chief Justice (slip opinion, pp. 6-8). However, the mere occurrence of the *event* is not the reason for reversal. The reason is that experience shows occurrence of the *event* will probably result in an unfair trial. Thus reversal of the conviction is based on a reliably-supported presumption of unfairness.

As an example, the denial of counsel cases require no showing that the presence of counsel would have resulted in acquittal. Reversal is not ordered in these cases merely to satisfy a formalistic requirement that an accused be represented by counsel. The reason for reversal is that it is now widely recognized that the probable result of a denial of counsel is an unfair trial. Denial of counsel is the *event* which reliably supports the presumption of unfairness and the consequent reversal for denial of due process.

A similar analysis of all the situations in which convictions are set aside without requiring a showing of isolatable prejudice reveals that in each a specific *event*

has occurred. Further, the occurrence of the *event* has been found on the basis of legal and historical developments and reliable psychological considerations to carry with it the probability that unfairness will result.

II.

The *Estes* case differs significantly from those which the Court has reversed without requiring a showing of isolatable prejudice. In each of those cases the Court pointed to a definite *event* which offered reliable support for the presumption of unfairness. In each case the existence of this reliable support was both motivation and justification for the Court's presumption of unfairness and the consequent reversal.

In the *Estes* case the *event* supporting the presumption of unfairness was the presence of television cameras. We do not agree that in this case the presumption is a reliably-supported one. The view that this *event* reliably supports the presumption of unfairness in this case is itself supported by a series of presumptions rather than by the sound, rational basis which until now has been required. The factors relied upon as supporting the presumption of unfairness are in large part irrelevant to this case because they simply did not occur in this case. These factors are:

1. Witnesses will become caricatures; the testimony given and the impression made will be subtly or drastically altered.

Whatever the merits of this assumption it has little bearing on the *Estes* trial. There the only witnesses televised were certain representatives from the radio, press and television on the occasion of the pretrial hearing when the only matters discussed related to the televising of the trial.

The record shows that on October 2, 1963, nearly three weeks before the case was called for trial, the Court announced that no live television or sound would be permitted during the interrogation of jurors or the taking of testimony. This announcement appeared in the newspapers in Tyler (R. 9-13). It would seem that the witnesses, having a special interest in the trial, would be aware of what was common knowledge in the community. In addition there is little reason to suppose that the attorneys would not tell their witnesses whether they were to be televised. In any event petitioner neither testified nor called any witnesses. He makes no claim that the possibility of television made it difficult to obtain defense witnesses. He makes no claim that the prosecution witnesses thought they were being televised.

2. Jurors will be subject to a wide variety of pressures, fears and temptations.

This contention has little application to the plain facts of this case. Yet factors completely alien to this case are given serious, perhaps controlling, consideration. Thus it is said that other states may permit jurors to separate in televised trials even though the Estes jurors did not separate. It is said that television may divert the attention of jurors from the testimony of the witnesses even though the Estes trial was not televised during this period. It seems equally valid to speculate that in these future trials jurors will not be permitted to separate where the trial is televised or that television will not be permitted where jurors do separate. It also seems that in future trials, as in the Estes trial, invocation of the Rule against witnesses would prevent the televising or broadcasting of testimony. Ordinary restraint counsels that future cases can best be determined as they arise, and that hasty

action may settle the question before it is adequately stated.

3. Awareness of the television cameras may render counsel incapable of rendering effective service.

Reaction of counsel to conducting direct and cross-examination and devising trial strategy in a televised arena is simply a matter for another day and another trial. It has no relevance here. Although counsel for defendant stated before the testimony began that their ability would be impaired by the presence of television cameras (R. 62-66), this objection was laid to rest by the trial court ruling against live television and sound during the trial on the merits. The materiality of this statement as an issue in this case is properly judged by reference to the context in which it was made and consideration of the manner in which the trial was subsequently conducted. We refer the Court to the statement of the Court of Criminal Appeals of Texas that

“we know of no case where the accused received better or more efficient representation than did appellant in the present case.” (R. 137).

4. Judges might exploit the public relations opportunities offered by televised trials.

This is merely a recognition that the incumbent has an advantage over the challenger in all phases of publicity. However, the implication is that a judge who refuses to permit television will face a torrent of criticism from the television industry. It has not happened in Texas. So far as we are aware only the Washburn trial has been televised in its entirety in Texas. (*Texas Bar Journal*, Feb. 1956: Appendix, Brief of the State Bar of Texas as Amicus Curiae on file in this case). The Estes trial was televised only to a limited extent.

We are not aware that any other criminal cases have been televised at all beyond a showing of silent film clips as background for the usual commentary on regular television news programs. Opposing the turmoil hypotheated by some and the supposed existence of relentless pressures on the judges we have the benefit of uncontroverted experience in Texas. The lesson of actual experience should weigh as heavily upon the balance as the suppositions and presumptions of those with little experience. Commercial exploitation of the judicial process simply has not occurred in Texas notwithstanding its failure to adopt Canon 35 or its equivalent. There is little rational basis for the supposition that it will suddenly do so. The Washburn trial was carried as a public service with no commercials at all. The only commercials which were shown in connection with the Estes trial were during the live telecast of the hearing on motions which occurred on September 24 and the replay of that hearing on videotape later that night. In no event was there any sale of commercial time for showing during the Estes trial. The only commercials shown were those which would have been shown regardless of the nature of the program (R. 72, 84). There are no claims of pressures actually being applied to the judges in Texas; there are only vaguely articulated fears that this could happen somewhere. If there has been any such pressure on the judges it has been demonstrably unsuccessful. It is said in the concurring opinion of the Chief Justice that

“The very presence of the cameras at the September hearing tended to impress upon the trial judge the power of the communications media and the criticism to which he would have been subjected if he had ruled that the presence of the cameras was

inconsistent with petitioner's right to a fair trial."
(slip opinion, p. 16)

However persuasively this point may appeal to those who agree with it as an abstract matter, it has little relevance here. For the record clearly indicates that, notwithstanding "the power of the communications media and the criticism to which he would have been subjected," the trial judge *did* rule that live television of the trial was inconsistent with petitioner's rights. Television was restricted at the trial and as a practical matter petitioner's motion to ban live television of the trial was in large measure granted.

5. Public clamor may reach such intensity that the conduct of the trial may be affected.

o Petitioner's difficulties were the subject of widespread pretrial publicity, the usual accompaniment to the fall of a prominent person. It is difficult to imagine how the television present in this case could have increased the public knowledge of the trial. In any event the trial was far removed from the place where the indictment was returned. The offense was not one which inflames the passions. There is not the slightest evidence that petitioner's trial would have been affected by mob action or swayed by undercurrents of public hostility even if completely televised. But in view of the mundane nature of the offense and the limited use of television the argument that the trial was affected by public indignation is attenuated to the point of transparency.

III.

These then are the basic arguments for the view that the presence of television in the courtroom in Tyler offers reliable support for a presumption of unfairness in the Estes trial.

It is said in the opinion of the Court that

"(t)he State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored." (slip opinion, p. 16)

We do not say that these factors are hypothetical because they are "difficult of ascertainment." They are hypothetical because they are largely irrelevant to the case now before the Court. They did not and hardly could have occurred in the Estes trial.

The statement quoted above is followed by the statement that

"(n)or are they 'purely hypothetical.' They are no more hypothetical than were the considerations deemed controlling in *Tumey*, *Murchison*, *Rideau* and *Turner*." (slip opinion, p. 16)

We think the Court has fallen into serious and probably irrevocable error as a result of improper analysis of the cases cited. There is a significant difference in the considerations deemed controlling in the Estes case and those which controlled the cases cited. It will advance the understanding of our position to examine these cases as well as some others cited in support of the view that this is an appropriate case for reversal even without a showing of isolatable prejudice.

Rideau v. Louisiana, 373 U.S. 723 (1963). This trial involved a particularly brutal crime and resulted in a death sentence. The event supporting the presumption of unfairness was compounded of three occurrences:

1. A 20-minute film depicting the defendant while making a detailed confession was televised on three occasions in Calcasieu Parish.

2. The trial was held in Calcasieu Parish, the same Parish in which the crime was committed.

3. Three members of the jury which found Rideau guilty had seen the televised confession.

It is said that in *Rideau* the Court "constructed a rule" which required reversal of the Rideau conviction

"even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial." (slip opinion, p. 4)

We do not dispute the existence of such a rule (even though the *Rideau* majority may have seen a nexus in the presence of three jurors who saw the televised confession). However, it has no application to the circumstances which we claim require the showing of a nexus in the ~~Estes~~ case. Neither *Rideau* nor any other case has established a rule permitting reliance on nonexistent factors to support a presumption of unfairness. In *Rideau* the televising of the confession *did* occur; the motion for continuance *was* denied; three members of the jury *did* see the televised confession. But in making its determination as to whether or not the presence of television in the *Estes* trial can rationally support the presumption of unfairness the Court has relied on considerations that *did not* occur and are therefore hypothetical. That is, the jury *did not* separate and it is wholly inappropriate to discuss what might happen when jurors do separate. The taking of testimony *was not* televised and therefore speculations about the distracting effect of television on witnesses, jurors, de-

fendants, judge and counsel are irrelevant. The Court in *Rideau* relied on certain, definite occurrences to support the presumption of unfairness. The majority in *Estes* relied to a large extent on factors that did not occur to support the presumption of unfairness. We question the logical integrity of the process by which the majority has determined that the limited presence of television in the *Estes* trial was such an *event* as will in turn rationally support a presumption of unfairness in the trial.

Brown v. Board of Education, 347 U.S. 483* (1954).

In this case the *event* which supported the presumption of unfairness (that is, the presumption of inherent inequality in the "separate but equal" doctrine) was the existence of racial segregation in the public schools. The Court had for support nearly a century of history and such a well-developed mass of psychological data that it could say:

"this finding is amply supported by modern (psychological) authority." 347 U.S. at 494.

In addition the series of holdings in the "graduate school cases" had eroded the flanks of the "separate but equal" doctrine to the extent that the decision in the *Brown* case was predictable.

Tumey v. Ohio, 273 U.S. 510 (1927). This case held that a trial in which the judge had a pecuniary interest in the outcome violated the Fourteenth Amendment. The *event* supporting the presumption of unfairness in this case was the fact that the judge, acting without a jury, received a fee only upon conviction. Manifest considerations of human nature as well as history militate against such a procedure.

The Court stated that at common law

"in analogous cases it is very clear that the slightest pecuniary interest of any officer, judicial or quasi judicial, in the resolving of the subject matter which he was to decide, rendered the decision voidable." 273 U.S. at 524.

Thus we see there existed a sound, rational and relevant basis for the decision in *Tumey*.

In *re Murchison*, 349 U.S. 133 (1955). The event supporting the presumption of unfairness in this case was that the judge who found the petitioner guilty of criminal contempt committed before a one-man grand jury was the same person who had served as the one-man grand jury and who brought the contempt charges against the petitioner. This procedure was clearly at odds with the historical separation of the function of the grand jury from that of the trial fact finder. The decision also recognized what cannot be disputed; an accuser should not judge. The opinion of the Court in the *Estes* case quoted the following language from *Murchison*:

"A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness..." (slip opinion, p. 9)

The sentence immediately following this quotation was omitted from the *Estes* opinion, but reveals the essence as well as the soundness of the holding in *Murchison*:

"To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." 349 U.S. at 136.

Gideon v. Wainwright, 372 U.S. 335 (1963). This case and many others dealing with various facets of the

same problem recognize that the denial of counsel reliably supports a presumption of unfairness in the trial. The *event* in these cases is the fact of denial of counsel. It is unnecessary to relate the extensive experience the Court has had in this area. The soundness of the presumption cannot be doubted.

Turner v. Louisiana, 379 U.S. 466 (1965). The *event* in this capital case which supported a presumption of unfairness was the fact that the two principal prosecution witnesses were the same deputy sheriffs who were in charge of the sequestered jury and were, therefore, continually associated in a friendly capacity with the jury during the trial. A primary objective of our system is the isolation of the jury from extraneous sources of information. Subtle argument is not required to demonstrate the clear dangers inherent in the procedures found in *Turner*. The presumption of unfairness was there based upon a factual occurrence.

There are other cases which have involved similar reasoning by the Court. Such cases as *Pointer v. Texas*, 380 U.S. 400 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Griffin v. California*, 380 U.S. — (1965); and *Jackson v. Denno*, 378 U.S. 368 (1964) have required that the Court assess the results of human behavior in varying contexts. It must be recognized, however, that these assessments have been made within a framework of values protected against federal encroachment by the Bill of Rights. The usual question in these cases has been whether rights secure against federal invasion should also be made secure against state invasion, and in *Jackson v. Denno* whether certain procedures violated a right already secure against both federal and state invasion. It is clear that the *event*

in each of those cases (i.e. *Pointer*, denial of confrontation; *Mapp*, illegal search and seizure; *Griffin*, self-incrimination; *Jackson*, coerced confession) actually occurred, and that the presumption of unfairness was founded on considerations of great substance, not the least of which was the pre-existing determination that the right should be protected against federal invasion. The event or right asserted by petitioner concerns a matter which has never even been before this Court. The question is not simply whether petitioner received a fair trial. That, of course, is the ultimate question. However, the absence of a showing of actual unfairness injects a new consideration into the analysis. The preliminary question which must be answered is whether the televising of Estes' trial can reasonably support a presumption of unfairness. The answer to this question requires attention to the actual manner in which the trial was conducted and the actual extent to which the trial was televised.

IV.

We recognize that due process must be observed during the pretrial stages. In *Hamilton v. Alabama*, 368 U.S. 52 (1961), the defendant was not represented by counsel at his arraignment. The Court took cognizance of the fact that under Alabama law certain substantial matters were required to be presented at arraignment. Since the defendant was not represented by counsel during this critical period when substantial advantages could have been waived through ignorance, the conviction was set aside. In *White v. Maryland*, 373 U.S. 59 (1963), the defendant pleaded guilty in a preliminary hearing at a time when he was not represented by counsel. This guilty plea was later introduced in evidence at the trial. The conviction was reversed by

this Court. In *Pointer v. Texas* 380 U.S. 400, *supra*, the testimony of the chief prosecution witness was taken at an examining trial. The defendant who was not then represented by counsel did not cross-examine. At the later trial the witness was not available and the transcript of his testimony at the examining trial was introduced in evidence over his objection. The conviction was reversed by this Court. These cases have been reversed because of the substantial relation between the pretrial occurrence and the merits of the issue decided at the trial.

There is a superficial resemblance between *Rideau*, 373 U.S. 723, *supra*, and *Estes*. In each a proceeding was televised in advance of the actual trial. But there the resemblance ends. In *Rideau* the defendant's detailed confession to a brutal crime was televised on three occasions in the Parish in which the crime was committed. The trial was held two months later in the same Parish before a jury which included three people who had seen the televised confession. It is difficult to imagine a more substantial relation between a pretrial event and the merits of the trial itself. In *Rideau* the subject matter of the pretrial telecast was in every respect identical to the subject matter of the trial on the merits. The subject matter on each occasion was Rideau's guilt or innocence of a certain crime.

In *Estes* the September hearing was concerned with petitioner's objection to televising the trial. It is said that since this hearing was itself televised

“(p)etitioner clearly did not have a fair determination of his motion to exclude cameras from the courtroom.” (Concurring opinion of the Chief Justice, slip opinion, p. 16)

We disagree. We suggest, however, that it is beside

the point since the motion was in effect granted insofar as it related to live television coverage of the trial. The September hearing did not discuss the merits of the case. The subject matter of that hearing and the trial were not the same. The live television coverage of the trial was extremely limited.

V.

Coupled with the Court's analysis, perhaps the cause of it, is the deeply-felt concern with which the Court views any discussion of television in the courtroom. But this concern, commendable for its devotion to fairness, must not be translated into an excessive fearfulness which obscures the issues. However, such fears are indicated by certain language in the opinions. References are made to the trial as a "show" or "theater," to the television camera lens as "snouts" and to trial judges and the television industry as "partners." The Estes trial is somehow compared with trials in Moscow and Havana. A New York Times article in classic journalese is cited as a supplement to the record in the case. There is a phantasmagorical recollection of the television quiz show scandals. These remarks do not contribute to a rational consideration of the factors relevant to this case. More importantly they import a zeal which has lost sight of the objective—an apprehension of the possible which has veiled the actual. We do not come to praise the televised trial, neither do we wish to see it buried in constitutional ceremonies. The objective is neither to praise nor bury. It is to determine whether actual unfairness tainted the Estes conviction, or whether unfairness can be presumed from the actual manner in which the trial was conducted. It was stated in the opinion of the Court that

“(o)ur judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.” (slip opinion, p. 18)

The “facts as they are presented” by the record in this case will not support a presumption of unfairness in the trial.

Sustaining this conviction will not affect the validity of Canon 35 in jurisdictions where it or similar language is enforced. It will not change the notions of lawyers and judges as to proper courtroom decorum. It will not give the television industry carte blanche to the courtroom. It will not mean that televised trials are desirable. It will only mean that the limited presence of television in petitioner’s trial was not a violation of the Fourteenth Amendment.

CONCLUSION

For the reasons stated the Petition for Rehearing should be granted.

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JUL 13 1965

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1964

NO. 256.

BILLIE SOL ESTES,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari to the Court of
Criminal Appeals of Texas

**MOTION FOR PERMISSION TO
FILE PETITION FOR REHEARING**

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**TO THE HONORABLE SUPREME COURT OF
THE UNITED STATES:**

Comes now The State of Texas and files this its Motion for Permission to File a PETITION FOR REHEARING in the above styled and numbered cause. This Motion is filed under the provisions of Paragraph 1, Rule 58, of the Revised Rules of the Supreme Court of the United States, which provides that the time for filing a motion for rehearing may be enlarged by the Court or a Justice thereof.

Movant herein would show the Court that the PETITION FOR REHEARING was prepared in a time-

ly manner for presentation to the Court on or before July 2, 1965. The PETITION FOR REHEARING was placed in the United States Mail on July 1, 1965. Due to clerical inadvertance it was sent by ordinary mail and, therefore, did not arrive at the Office of the Clerk of the Supreme Court of the United States within the time allowed for filing. Movant verily believes that if the PETITION FOR REHEARING had been transmitted by United States Postal Service, Air Mail, Special Delivery, as was intended, that same would have arrived to be filed in a timely manner.

WHEREFORE, premises considered, The State of Texas moves this Honorable Supreme Court to grant permission for the filing of Respondent's PETITION FOR REHEARING the same as if such PETITION had arrived at the Office of the Clerk of the Supreme Court of the United States on July 2, 1965.

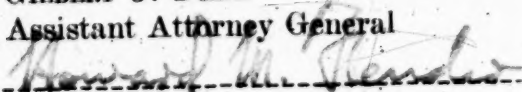
Respectfully submitted,

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AFFIDAVIT


I, Howard M. Fendér, Assistant Attorney General of Texas, one of the attorneys for movant herein and a member of the Bar of the Supreme Court of the United States, hereby certify that I have prepared the foregoing and have read same over and that the facts recited therein are true and correct.



HOWARD M. FENDER

CERTIFICATE OF SERVICE

I, Howard M. Fender, Assistant Attorney General of Texas, one of the attorneys for the movant herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ~~12th~~ day of July, 1965, I served copies of the foregoing Motion for Leave to File Petition for Rehearing on the Honorable John D. Cofer, one of the attorneys for the Petitioner, Billie Sol Estes, by mailing a copy in a duly addressed envelope with first class postage prepaid, addressed to John D. Cofer, Cofer, Cofer & Hearne, Capital National Bank Building, Austin, Texas.



HOWARD M. FENDER